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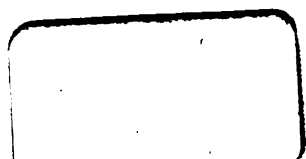
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CANADIAN RAILWAY CASES.

CONTAINING

A SELECTION OF CASES AFFECTING RAILWAYS RECENTLY DECIDED
BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,
THE SUPREME COURT AND THE EXCHEQUER COURT
OF CANADA, AND THE COURTS OF THE PROVINCES
OF CANADA, INCLUDING DECISIONS OF THE BOARD
OF RAILWAY COMMISSIONERS FOR CANADA,
PUBLISHED BY AUTHORITY OF THE
BOARD, WITH NOTES AND COMMENTS.

BY

ANGUS MACMURCHY, K.C.

AND

SHIRLEY DENISON

OF OSGOODE HALL, TORONTO,
BARRISTERS-AT-LAW.

VOLUME VIII.

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TABLE OF CONTENTS.

Addenda et Corrigenda	iv
Table of Cases Reported	v
Table of Cases Cited.....	xi
Jurisdiction—Location—Priority	1
Rates on Stone—Mileage Basis	10
Jurisdiction—Protective Measures	14
Junior and Senior Company	20
Undue Delay—Freight Traffic	23
Undue Preference	33
Commutation—Unjust Discrimination	42, 168
Joint Tariffs	46
Jurisdiction—Farm Crossing	50
Compensation—Damage to Remaining Land	53
Negligence—Level Crossings—Signals	61
Contributory Negligence	69, 434
Street Railway—Reduced Rates	125
Cattle at Large—Fences	137
Fencing—Animals Killed on Track	143
Flag Station—Facilities	151
Unjust Discrimination—Tariffs	173
Rates—Main and Branch Line Traffic	183
Contract—Undercrossing	190
Interswitching Charges—Refund	192
Jurisdiction of the Board—Connection of Railways	195
Contract	200
Agreement	202
Subway—Agreement	205
Expropriation	223
Award—Appeal	226
Costs	244
Arbitration and Award—Damages	251
Trespass—Damages	265
Infant—Allurement	269
Negligence	276
Right to Sue	291
Agreement—Property—Meaning of	310
Railway Crossing—Absence of Approval	314

Demurrage—Contract of Carriage	332
Extension of Free Time	337
Unjust Discrimination—Freight Rates	339
Contract	346
Construction of Railway—Diversion of Highway	354
Contract—Limiting Liability	369
Exemption from Liability	406
Tolls—Reasonableness	424
Criminal Law—Jurisdiction	453
Farm Crossing	464
Rights of Passengers—Authority of Conductor	477
Contributory Negligence—Disobedience to Rules	484
Digest of Cases	497

ADDENDA ET CORRIGENDA.

Page 192, insert at top of head note as catch words:—

“Interswitching Charges—Refund—Switching Tariff not Illegal Because not Filed—Jurisdiction of the Board—Retroactive Order.”

Page 148, line 10, for “agrees” read “argues.”

TABLE OF CASES REPORTED.

Alexander v. Canadian Pacific R.W. Co., Q.R. 33 S.C. 438...	406
Algoma Central & Hudson Bay R.W. Co. v. Grand Trunk R.W. Co.	46
Attorney-General for British Columbia v. Canadian Pacific R.W. Co.	346
Bay of Quinte R.W. Co. v. Kingston & Pembroke R.W. Co...	202
Beaton v. Mabou & Gulf R.W. Co., 44 N.S.R. 429.....	251
Bell Telephone Co., Dignam v.	200
Bell Telephone Co. v. Windsor, Essex & Lake Shore Rapid R.W. Co.	20
Bennetto v. Canadian Pacific R.W. Co., 18 Man. L.R. 13...	223
Bird v. Canadian Pacific R.W. Co., 1 Sask. L.R. 266.....	314
Boards of Trade of Galt et al. v. Grand Trunk et al. R.W. Cos.	195
Brazeau v. Canadian Pacific R.W. Co., (Unreported).....	477
Brenner v. Toronto R.W. Co., 15 O.L.R. 195, 40 S.C.R. 540.	100, 108
Canadian Car Service Bureau, Wallaceburg Sugar Co. v. (Average Demurrage Case)	332
Canadian Northern R.W. Co. v. Robinson, 17 Man. L.R. 396, 579	226, 244
Canadian Northern Quebec R.W. Co., Laporte v., (Un- reported)	137
Canadian Pacific R.W. Co., Alexander v., Q.R. 33 S.C. 438...	406
Canadian Pacific R.W. Co., Attorney-General for British Columbia v.	346
Canadian Pacific R.W. Co., Bennetto v., 18 Man. L.R. 13...	223
Canadian Pacific R.W. Co., Bird v., 1 Sask. L.R. 266.....	314
Canadian Pacific R.W. Co., Brazeau v., (Unreported)....	477
Canadian Pacific R.W. Co., Coley v., Q.R. 29 S.C. 282.....	269
Canadian Pacific R.W. Co. v. Coley, Q.R. 16 K.B. 404.....	274
Canadian Pacific R.W. Co., Crow's Nest Pass Coal Co. v.....	33
Canadian Pacific R.W. Co., East Kootenay Lumber Co. v., 13 B.C.R. 422	310
Canadian Pacific R.W. Co., Fraser v., 17 Man. L.R. 667....	205
Canadian Pacific R.W. Co. v. Gordon, (Unreported).....	53
Canadian Pacific R.W. Co., Mason & Risch Piano Co. v., 1 Sask. L.R. 213.....	369

Canadian Pacific R.W. Co., Mercer v., 17 O.L.R. 585.....	372
Canadian Pacific R.W. Co., Quinn v., (Unreported).....	143
Canadian Pacific R.W. Co., Ruddick v., (Unreported).....	484
Canadian Pacific R.W. Co., Smyth v., 1 Sask. L.R. 165.....	265
Canadian Pacific R.W. Co., Stiles v.	190
Canadian Pacific R.W. Co., Toll v., 1 Alta. L.R. 244, 318..	291, 294
Canadian Pacific R.W. Co., Winnipeg Jobber's Association v. (Kootenay Rate Case).....	173
Canadian Pacific, Canadian Northern and Grand Trunk Pacific R.W. Cos., Winnipeg Jobber's Association v. (Flag Station Case and Winnipeg Rate Case)....	151, 175
Coley v. Canadian Pacific R.W. Co., Q.R. 29 S.C. 282.....	269
Coley, Canadian Pacific R.W. Co. v., Q.R. 16 K.B. 404....	274
Crow's Nest Pass Coal Co. v. Canadian Pacific R.W. Co.....	33
Delta, Municipality of, Vancouver, Victoria & Eastern R.W. & Nav. Co. v.	354
Delta, Municipality of v. Vancouver, Victoria & Eastern R.W. & Nav. Co., 14 B.C.R. 83.....	362
Dignam v. Bell Telephone Co.	200
Doolittle & Wilcox v. Grand Trunk and Canadian Pacific R.W. Cos. (Stone Quarry Rates Case).....	10
East Kootenay Lumber Co. v. Canadian Pacific R.W. Co., 13 B.C.R. 422.....	310
Essex Terminal R.W. Co. v. Windsor, Essex & Lake Shore Rapid R.W. Co., 40 S.C.R. 620.....	1
Fraser v. Canadian Pacific R.W. Co., 17 Man. L.R. 667.....	205
Gordon, Canadian Pacific R.W. Co. v., (Unreported).....	53
Grand Trunk R.W. Co., Algoma Central & Hudson Bay R.W. Co. v.	46
Grand Trunk et al. R.W. Cos., Boards of Trade of Galt et al. v.	195
Grand Trunk R.W. Co., Doolittle & Wilcox v., (Stone Quarry Rates Case)	10
Grand Trunk R.W. Co., Laidlaw Lumber Co. v.	192
Grand Trunk R.W. Co., In re Lord's Day Act and.....	23
Grand Trunk R.W. Co., Malkin & Sons v., (Tan Bark Rates Case)	183

Grand Trunk and Canadian Pacific R.W. Cos., McDiarmid & Gall v.	337
Grand Trunk and Canadian Pacific R.W. Cos., Rex v., 17 O.L.R. 601.....	453
Grand Trunk and Canadian Pacific R.W. Cos., Rideau Lumber Co. et al. v.	339
Grand Trunk R.W. Co. v. Sims, (Unreported).....	61
Grand Trunk R.W. Co., Sutherland v., 18 O.L.R. 139.....	389
Grand Trunk R.W. Co., Wegenast v., (Brampton Commutation Rate Case).....	42, 168
Kingston & Pembroke R.W. Co., Bay of Quinte R.W. Co., v..	202
Laidlaw Lumber Co. v. Grand Trunk R.W. Co.....	192
Laporte v. Canadian Northern Quebec R.W. Co., (Unreported)	137
Lord's Day Act and Grand Trunk R.W. Co., In re.....	23
Lott v. Sydney & Glace Bay R.W. Co., 44 N.S.R. 153.....	276
Mabou & Gulf R.W. Co., Beaton v., 44 N.S.R. 429.....	251
Malkin & Sons v. Grand Trunk R.W. Co., (Tan Bark Rates Case)	183
Mason & Risch Piano Co. v. Canadian Pacific R.W. Co., 1 Sask. L.R. 213.....	369
McDiarmid & Gall v. Grand Trunk and Canadian Pacific R.W. Cos.	337
Mercer v. Canadian Pacific R.W. Co., 17 O.L.R. 585.....	372
Milligan v. Toronto R.W. Co., 17 O.L.R. 530.....	434
Minudie Coal Co., Rodger v., 32 N.S.R. 210.....	424
Naylor v. Windsor, Essex & Lake Shore Rapid R.W. Co.....	14
New v. Toronto, Hamilton & Buffalo R.W. Co.	50
Quinn v. Canadian Pacific R.W. Co., (Unreported).....	143
Rex v. Grand Trunk and Canadian Pacific R.W. Cos., 17 O.L.R. 601	453
Rideau Lumber Co. et al. v. Grand Trunk and Canadian Pacific R.W. Cos.	339
Robinson, Canadian Northern R.W. Co. v., 17 Man. L.R. 396, 579.....	226, 244

Rodger v. Minudie Coal Co., 32 N.S.R. 210.....	424
Ruddick v. Canadian Pacific R.W. Co., (Unreported).....	484
Sandwich East, Township of and Windsor & Tecumseh	
Electric R.W. Co., In re, 16 O.L.R. 641.....	125
Simpson Brick Co., Toronto, Hamilton & Buffalo R.W. Co.	
v., 17 O.L.R. 632.....	464
Sims, Grand Trunk R.W. Co. v., (Unreported).....	61
Smyth v. Canadian Pacific R.W. Co., 1 Sask. L.R. 165.....	265
Stiles v. Canadian Pacific R.W. Co.	190
Sutherland v. Grand Trunk R.W. Co., 18 O.L.R. 139.....	389
Sydney & Glace Bay R.W. Co., Lott v., 41 N.S.R. 153.....	276
Tinsley v. Toronto R.W. Co., 15 O.L.R. 438, 17 O.L.R. 74. .69, 90	
Toll v. Canadian Pacific R.W. Co., 1 Alta. L.R. 244, 318. .291, 294	
Toronto R.W. Co., Brenner v., 15 O.L.R. 195, 40 S.C.R.	
540.....	100, 108
Toronto R.W. Co., Milligan v., 17 O.L.R. 530.....	434
Toronto R.W. Co., Tinsley v., 15 O.L.R. 438, 17 O.L.R. 74. .69, 90	
Toronto, Hamilton & Buffalo R.W. Co., New v.	50
Toronto, Hamilton & Buffalo R.W. Co. v. Simpson Brick Co.,	
17 O.L.R. 632.....	464
Vancouver, Victoria & Eastern R.W. & Nav. Co. v. Municipi-	
pality of Delta	354
Vancouver, Victoria & Eastern R.W. & Nav. Co., Municipi-	
pality of Delta v., 14 B.C.R. 83.....	362
Wabash R.W. Co., Walker v., 18 O.L.R. 21.....	487
Walker v. Wabash R.W. Co., 18 O.L.R. 21.....	487
Wallaceburg Sugar Co. v. Canadian Car Service Bureau	
(Average Demurrage Case).....	332
Wegenast v. Grand Trunk R.W. Co. (Brampton Commuta-	
tion Rate Case).....	42, 168
Windsor, Essex & Lake Shore Rapid R.W. Co., Bell Tele-	
phone Co. v.	20
Windsor, Essex & Lake Shore Rapid R.W. Co., Essex Ter-	
minal R.W. Co. v., 40 S.C.R. 620.....	1
Windsor, Essex & Lake Shore Rapid R.W. Co., Naylor v....	14

CASES REPORTED.

ix

Windsor & Tecumseh R.W. Co., In re Township of Sand- wich East and, 16 O.L.R. 641.....	125
Winnipeg Jobber's Association v. Canadian Pacific R.W. Co., (Kootenay Rate Case).....	173
Winnipeg Jobber's Association v. Canadian Pacific, Cana- dian Northern and Grand Trunk Pacific R.W. Cos., (Flag Station Case and Winnipeg Rate Case)...	151, 175

CASES CITED.

Algoma Central & Hudson Bay R.W. Co. v. Grand Trunk R.W. Co.	5 Can. Ry. Cas. 196	47
Allen v. North Metropolitan Tram- ways Co.	4 T.L.R. 561	72, 438
Almonte Knitting Co. v. Canadian Pa- cific & Michigan Central R.W. Cos.	3 Can. Ry. Cas. 441	183
Ancil v. City of Quebec	33 S.C.R. 347	252
Anderson v. Anderson	[1895] 1 Q.B. 749	313
Armstrong v. Canada Atlantic R.W. Co.	2 O.L.R. 219, 4 O.L.R. 560, 1 Can. Ry. Cas. 444, 2 Can. Ry. Cas. 339	298
Arthur v. Central Ontario R.W. Co.	11 O.L.R. 537, 5 Can. Ry. Cas. 318	147
Atchison, Topeka & Santa Fe R.W. Co., In re	10 I.C. Rep. 473	35
Atlantic & North-West R.W. Co. v. Wood	[1895] A.C. 259	228
Atlas Insurance Co. v. Brownell	29 S.C.R. 537	388
Attorney-General v. Liverpool	1 Myl. & Cr. 171	212
Attorney-General v. Logan	[1891] 2 Q.B. 100	364
Attorney-General v. Mayo	[1902] 1 Ir. 13	212
Attorney-General & Hare v. Metro- politan R.W. Co.	[1894] 1 Q.B. 384	55
Attorney-General and Rhondda Ur- ban District Council v. Pontypridd Water Works Co.	77 L.J.C.P. 237	364
Avery v. Wood	[1891] 3 Ch. 115	247
Bacon v. Grand Trunk R.W. Co.	12 O.L.R. 196, 5 Can. Ry. Cas. 325	147
Bailey v. Isle of Thanet Light Rail- ways Co.	[1900] 1 Q.B. 722	228
Bannatyne v. Suburban Rapid Tran- sit Co.	15 Man. L.R. 7	211
Barnes v. Ward	19 L.J.C.P. 195	316
Barret v. Great Northern and Mid- land R.W. Cos.	1 Ry. & C. Tr. Cas. 38	47
Batley v. Kynock	L.R. 20 Eq. 632	248
Baxter v. Royal Mail	[1908] 1 K.B. 196, (1908) 2 K.B. 626	375
Beam v. Beatty	2 O.L.R. 362, 4 O.L.R. 554	299
Beard v. Credit Valley R.W. Co.	9 O.R. 616	252
Beatty and City of Toronto, In re ..	13 P.R. 316	245
Beauchamp v. Cloran	11 L.C.J. 287	272
Becker v. Canadian Pacific R.W. Co.	7 Can. Ry. Cas. 29	150
Beckett v. Grand Trunk R.W. Co.	13 A.R. 174, 16 S.C.R. 713	97
Beckett v. Midland R.W. Co.	37 L.J.C.P. 11	212
Beever v. Hanson	25 L.J. (N.C.) 132	307
Bermondsey, Vestry of v. Brown	L.J. 1 Eq. 204	366
Bernina, The	12 P.D. 58, 13 App. Cas. 1	124
Bicknell v. Grand Trunk R.W. Co.	26 A.R. 431	396
Biddeson v. Canadian Northern R.W. Co.	7 Can. Ry. Cas. 17	145
Birely and Toronto, Hamilton & Buf- falo R.W. Co., In re	28 O.R. 468, 25 A.R. 88	55

Blake v. Canadian Pacific R.W. Co.	17	O.R. 177	438
Book v. Book	15	O.R. 119, 21 Occ. N. 111, 1 O.L.R. 86	302
Booth v. Canadian Pacific R.W. Co.	5	Can. Ry. Cas. 389	371, 374, 401
Bradford, Mayor and Corporation of v. Pickles	[1895]	A.C. 587	479
Brant Milling Co. v. Grand Trunk R.W. Co.	4	Can. Ry. Cas. 259	33
Brice v. Canadian Pacific R.W. Co.	7	West. L.R. 143	247
Bridges v. North London R.W. Co.	L.R. 7	H.L. 213	79
Bristol and North Somerset R.W. Co. v. Somerset & Dorset R.W. Co.	22	W.R. 399	223
British Columbia Pacific Coast Cities v. Canadian Pacific R.W. Co. (Van- couver Interior Rates Case)	7	Can. Ry. Cas. 125	173, 346
Brock, Township of v. Toronto & Nipissing R.W. Co.	37	U.C.R. 372	252
Brocklebank, Ex parte	48	L.J. Bh. 113, 37 L.T. 282, 25 W.R. 859	305
Bronson and Canada Atlantic R.W. Co., In re	13	P.R. 440	245
Brown v. Grand Trunk R.W. Co.	24	U.C.R. 350	253
Brown v. London Street R.W. Co.	2	O.L.R. 53, 1 Can. Ry. Cas. 385	124
Buccleuch, Duke of v. Metropolitan Board of Works	5	H.L. 418	55
Bullard v. Northern Pacific R.W. Co.	10	Mont. Rep. 168	35
Bwlfa v. Pontypridd Waterworks Co.	[1903]	A.C. 426	228
Cain v. Uhlman	20	N.S.R. 148	253
Calder v. Midland & Victoria Beach R.W. Co.	23	C.L.T. 18	253
Caledonian R.W. Co. v. Colt	7	Jur. (N.S.) 475	212
Caledonian R.W. Co. v. Ogilvy	2	Macq. 229	57, 212
Caledonian R.W. Co. v. Walker's Trustees	7	App. Cas. 259	212
Canada Colored Cotton Mills Co. v. Kervin	28	O.R. 73, 29 S.C.R. 478	298
Canada Paint Co. v. Trainor	28	S.C.R. 352	298
Canada Southern R.W. Co. v. Town of Niagara Falls	22	O.R. 41	468
Canadian Bank of Commerce v. Per- ram	31	O.R. 116	382
Canadian Manufacturers' Association v. Canadian Freight Association (Joint Switching Rates Case)	7	Can. Ry. Cas. 302	192
Canadian Pacific R.W. Co. and Bat- ter, In re	13	Man. L.R. 200, 1 Can. Ry. Cas. 457	223
Canadian Pacific R.W. Co. v. Car- ruthers	39	S.C.R. 251, 7 Can. Ry. Cas. 23	147
Canadian Pacific R.W. Co. v. Grand Trunk R.W. Co.	12	O.L.R. 320, 5 Can. Ry. Cas. 400	205
Canadian Pacific R.W. Co. v. Guthrie	31	S.C.R. 155, 1 Can. Ry. Cas. 9	51
Canadian Pacific R.W. Co. v. Hansen	40	S.C.R. 194, 7 Can. Ry. Cas. 441	302, 318

Canadian Pacific R.W. Co. v. Little	16 S.C.R. 606	223
Seminary of St. In��r��se	16 S.C.R. 606	223
Canadian Pacific R.W. Co. v. Roy	9 Q.B. 551, [1902] A.C. 220, 1 Can. Ry. Cas. 170, 196	253
Carruthers v. Canadian Pacific R.W. Co.	16 Man. L.R. 323, 6 Can. Ry. Cas. 13, 15	147
Cary-Elwes' Contract, In re	[1906] 2 Ch. 143	223
Casey v. Canadian Pacific R.W. Co.	15 O.R. 574	438
Catling v. Great Northern R.W. Co.	18 W.R. 121	228
Cavanagh and Canada Atlantic R.W. Co., In re	14 O.L.R. 523, 6 Can. Ry. Cas. 395	228
Central Vermont R.W. Co. v. Fran- chere	35 S.C.R. 68	301
Chantler v. Lindsey	4 D. & L. 339, 16 M. & W. 82, 16 L.J. Ex. 16	293
Chaplin v. Westminster	[1901] 2 Ch. 329	212
Charland v. The Queen	1 Ex. C.R. 291, 16 S.C.R. 721	228
Chicago & Milwaukee Electric R.W. Co. v. Illinois Central R.W. Co.	13 I. C. Rep. 20	49
Churton v. Frewen	15 W.R. 559	248
Clark v. Chambers	L.R. 3 Q.B.D. 327, 47 L.J.Q.B. 427	317
Clark v. London General Omnibus Co.	92 L.T. 691	285
Claypool v. McAllister	20 Ill. 504	482
Clayton v. Canadian Northern R.W. Co.	17 Man. L.R. 426, 7 Can. Ry. Cas. 355	149
Cohen v. South Eastern R.W. Co.	1 Ex.D. 217, 2 Ex.D. 253	393
Collier v. Georgia R.W. Co.	76 Ga. 611	328
Columbia R.W. Co. v. Hawthorne	144 U.S.R. 202	300
Commonwealth v. McChord	2 Dana. (Ky.) 242	460
Commonwealth v. Miller	2 Pars. Cas. (Penn.) 480	460
Cooper, Ex parte, North London R.W. Co., In re	34 L.J. Ch. 373	228
Copeland v. Sutherland	[1898] 1 Ch. 174	285
Corby v. Grand Trunk R.W. Co.	6 O.W.R. 81, 492	393
Cortese v. Canadian Pacific R.W. Co.	13 B.C.R. 322, 7 Can. Ry. Cas. 345	145
Costello v. Grand Trunk R.W. Co.	7 O.W.R. 846	371, 374, 394
Cowans v. Marshall	28 S.C.R. 161	298
Cowper-Essex v. Acton Local Board	14 App. Cas. 153	57
Cox v. Wright	11 W.R. 870, 32 L.J. Ch. 770, 8 L.T. 631, 2 N.R. 436, 9 Jur. (N.S.) 981	298
Crafter v. Metropolitan R.W. Co.	L.R. 1 C.P. 300, 35 L.J.C.P. 132, 1 H. & R. 164, 14 W.R. 344, 12 Jur. (N.S.) 372	298
Cranch v. Brooklyn Heights R.W. Co.	107 N.Y. App. Div. 341	73
Culbert v. McKeen	20 N.S.R. 1	429
Dagenais v. Dagenais	7 Q.P.R. 32	298
Daigle v. Temiscouata R.W. Co.	37 N.B.R. 219, 6 Can. Ry. Cas. 33	149
Danger v. London St. R.W. Co.	30 O.R. 493	83, 438
Daniel v. Canadian Pacific R.W. Co.	6 West. L.R. 538	299
Darley Main Colliery Co. v. Mitchell	11 App. Cas. 127	252
Davey v. London & South Western R.W. Co.	11 Q.R.D. 213, 12 Q.B.D. 70, 72, 88	
Davidson v. Grand Trunk R.W. Co.	5 O.L.R. 754, 2 Can. Ry. Cas. 371	147

Davis v. Kansas City, St. Joseph & Council Bluffs R.W. Co.	53 Mo. 317	481
Davy v. Haddon	3 Doug. 310	223
Delmatter v. Brown Bros.	9 O.L.R. 351	393
Dempster v. Lewis et al.	33 S.C.R. 292	285
Denaby Main Colliery Co. v. Manchester, Sheffield & Lincolnshire R.W. Co.	14 Q.B.D. 209	34
Devonport, Corporation of, v. Tozer	72 L.J. Ch. 411	364
Deyo v. Kingston & Pembroke R.W. Co.	8 O.L.R. 588, 4 Can. Ry. Cas. 42	487, 488
Diamond Match Co. v. Newhaven	3 Am. St. R. 7073	300
Dickenson v. London & North Western R.W. Co.	1 H. & R. 399	316
Didcot, Newbury & Southampton R.W. Co. v. London & South Western R.W. Co.	10 Ry. & C. Tr. Cas. 9	48
Dini v. Fauquier	8 O.L.R. 712	302
Dominion Concrete Co. v. Canadian Pacific R.W. Co.	6 Can. Ry. Cas. 514	192
Dominion Iron & Steel Co. v. Day	34 S.C.R. 387	298
Donly v. Holmwood	4 A.R. 555	472
Dublin, Wicklow & Wexford R.W. Co. v. Slattery	3 App. Cas. 1155	74, 98, 446
Dunsmuir v. Lowenberg	30 S.C.R. 334	68
Eads v. Maxwell	17 U.C.R. 179	302
Eagleton v. Gutteridge	11 M. & W. 465, 2 D. (N.S.) 1053, 12 L.J. Ex. 359	300
Eastern Counties & London & Blackwell R.W. Co. v. Marriage	9 H.L.C. 32	472
Eccleshill Local Board, In re	13 Ch.D. 365	228
Ecklin v. Little	6 T.R. 366, 34 Sol. Jo. 546	300
Ellis v. Great Western R.W. Co.	43 L.J.C.P. 304, L.R. 9 C.P. 551, 30 L.T. 874	298
Englehart v. Farrant	[1897] 1 Q.B. 240, 66 L.J.Q.B. 122	331
Eyre v. Highway Board of New Forest Union	8 T.L.R. 648	405
Farmer v. Grand Trunk R.W. Co.	21 O.R. 299	298
Farrell v. Grand Trunk R.W. Co.	2 Can. Ry. Cas. 249	290
Fensom v. Canadian Pacific R.W. Co.	7 O.L.R. 254, 8 O.L.R. 688, 2 Can. Ry. Cas. 376, 3 Can. Ry. Cas. 331, 4 Can. Ry. Cas. 76	148
Ferrand v. Mayor of Bradford	25 L.J. Ch. 389, 21 Beav. 422, 2 Jur. (N.S.) 360, 4 W.R. 350	306
Flight v. Bolland	4 Russ. 298, 28 R.R. 101	298
Foley v. East Flamborough	26 A.R. 46	316
Follett v. Toronto R.W. Co.	16 A.R. 346	76, 438
Follis v. Port Hope & Peterborough R.W. Co.	9 U.C.C.P. 50	252
Gairloch, The	[1899] 2 Ir. 1	285
Gallinger v. Toronto R.W. Co.	8 O.L.R. 698	72, 438
Galloway v. London	L.R. 1 H.L. 34	212

Geilinger v. Gibbs	66 L.J. Ch. 230, 76 L.T. 111, 45 W.R. 315	298
Gibbon v. Paynton	4 Burr. 2298	419
Gibraltar, Sanitary Commissioners of, v. Orfila	15 App. Cas. 400, 59 L.J.P.C. 95, 63 L.T. 58	300
Gilchrist and Island, In re	11 O.R. 537	393
Glasgow Union R.W. Co., City of, v. Hunter	L.R. 2 H.L. Sc. 78	57
Glengoil Steamship Co. v. Pilkington	28 S.C.R. 146	412
Goldberg v. Liverpool	82 L.T. 362	212
Gosnell v. Toronto R.W. Co.	21 A.R. 553, 24 S.C.R. 582	85
Gosnell v. Toronto R.W. Co. (No. 2) ..	4 O.W.R. 213	72, 438
Gough and Aspatria, Silloth & District Joint Water Board, In re	73 L.J.K.B. 228	228
Gould v. Staffordshire Water Works Co.	5 Ex. 214	223
Granby, Village of, v. Menard	31 S.C.R. 14	284
Grand Trunk R.W. Co. v. Attorney-General	[1907] A. C. 65, 76 L.J.P.C. 23, 95 L.T. 631, 23 T.L.R. 40	299
Grand Trunk R.W. Co. v. Birkett	35 S.C.R. 296, 5 Can. Ry. Cas. 54 ..	488
Grand Trunk R.W. Co. v. Canadian Pacific R.W. Co. (London Inter-switching Case)	6 Can. Ry. Cas. 327	193
Grand Trunk R.W. Co. v. Hainer	36 S.C.R. 180, 5 Can. Ry. Cas. 59 ..	97, 438
Grand Trunk R.W. Co. v. McKay	34 S.C.R. 81, 3 Can. Ry. Cas. 52 ..	317, 461
Grand Trunk R.W. Co. v. Perrault	36 S.C.R. 671, 5 Can. Ry. Cas. 293 ..	51, 317
Graves v. Adams Express Co.	176 Mass. 280	394
Great Northern R.W. Co. v. McAlister. [1897] 1 Ir. 587		474
Great Northern R.W. Co. v. Talbot ..	[1902] 2 Ch. 759	475
Great Western R.W. Co. v. Brown ..	3 S.C.R. 159	488
Great Western R.W. Co. v. Davies ..	39 L.T. 475	300
Great Western R.W. Co. v. Sutton ..	L.R. 4 H.L. 226	429
Green v. Toronto R.W. Co.	26 O.R. 319	81
Greene v. St. John & Maine R.W. Co. ..	22 N.B.R. 252	428
Griffin v. Mills	39 N.J.L. 587	460
Groves v. Wimborne	[1898] 2 Q.B. 402	284
Grandy, Kershaw & Co., In re	11 Ch. D. 108	247
Guthrie v. Canadian Pacific R.W. Co. ..	27 A.R. 64, 1 Can. Ry. Cas. 1	51
Haight v. Hamilton Street R.W. Co. ..	29 O.R. 279	284
Halifax Electric Tramway Co. v. Inglis	30 S.C.R. 256, 1 Can. Ry. Cas. 360 ..	76
Hall v. North Eastern R.W. Co.	L.R. 10 Q.B. 437	391
Hamilton, City of, v. Hamilton Street R.W. Co.	8 O.L.R. 642, 10 O.L.R. 594, 39 S.C.R. 273, 4 Can. Ry. Cas. 153, 5 Can. Ry. Cas. 223	135
Hammersmith & City R.W. Co. v. Brand	L.R. 4 H.L. 171	55, 472
Hammond v. Grand Trunk R.W. Co. ..	9 O.L.R. 64, 4 Can. Ry. Cas. 232 ..	479
Hansen v. Canadian Pacific R.W. Co. ..	7 Can. Ry. Cas. 429	302, 318
Harding v. Township of Cardiff	2 O.R. 329	228

Harris v. London Street R.W. Co.	10 O.W.R. 302, 39 S.C.R. 398	488
Hart v. Lancashire & Yorkshire R.W. Co.	21 L.T. 261	300
Haskill and Grand Trunk R.W. Co., In re	7 O.L.R. 429, 3 Can. Ry. Cas. 389	223
Hastings, Mayor of, v. South Eastern R.W. Co.	6 Q.B.D. 586	391
Hawcroft v. Great Northern R.W. Co.	21 L.J.Q.B. 178	481
Hayward v. Canadian Northern R.W. Co.	16 Man. L.R. 158, 6 Can. Ry. Cas. 411	375, 401
Hazeldine's Trusts, In re	[1908] 1 Ch. 34	223
Headland v. Coster	[1905] 1 K.B. 219	318
Heaslip v. Heaslip	14 P.R. 165	247
Hendrickson v. Queen Insurance Co.	30 U.C.R. 108, 31 U.C.R. 547	388
Hendrie v. Toronto, Hamilton & Buffalo R.W. Co.	26 O.R. 667, 27 Q.R. 46	211
Henry v. Armitage	53 L.J.Q.B. 111	393
Hickman v. Maisey	69 L.J.Q.B. 511	364
Hill v. Clifford	76 L.J. Ch. 627	223
Hill v. Toronto R.W. Co.	9 O.W.R. 988	72, 438
Hindmarsh v. Chandler	7 Taunt. 488, 1 Moore 250	298
Hindmarsh v. Southgate	3 Russ. 324, 27 R.R. 81	306
Holden v. Grand Trunk R.W. Co.	5 O.L.R. 301, 2 Can. Ry. Cas. 352	488
Holden v. Township of Yarmouth	5 O.L.R. 579, 3 Can. Ry. Cas. 74	316
Horton v. Colwyn Bay & Colwyn Urban District Council	[1908] 1 K.B. 327	56
Hughes v. Pennsylvania R.W. Co.	202 Penn. St. R. 222	393
Hyde v. Mayor of Manchester	12 C.B. 474	245
Inland Revenue, Commissioners of, v. Glasgow & South Western R.W. Co.	12 App. Cas. 315	228
I. C. C. v. Alabama Midland R.W. Co.	168 U.S.R. 145	34
I. C. C. v. Baltimore & Ohio R.W. Co.	43 Fed. Rep. 37, 3 I. C. Rep. 192	159
I. C. C. v. Texas & Pacific R.W. Co.	52 Fed. Rep. 187	34
Inglis v. Halifax Electric Tramway Co.	32 N.S.R. 117, 1 Can. Ry. Cas. 352	76
Inland Revenue, Commissioners of, v. Glasgow & South Western R.W. Co.	12 App. Cas. 315	228
Irwin v. Bank of Montreal	38 U.C.R. 387	302
Iseberg v. East India House Estate	33 L.J. Ch. 392	212
Iveson v. Moore	1 Ld. Raym. 486	212
Ivory, In re	10 Ch. D. 372, 39 L.T. 285, 27 W.R. 20	302
Jackson v. Metropolitan R.W. Co.	3 App. Cas. 193	72
James v. Ontario & Quebec R.W. Co.	12 O.R. 624, 15 A.R. 1	228
Jamieson v. Trevelyan	10 Ex. 748	247
Jewett v. Patterson R.W. Co.	62 N.J.L. 424	76
Kerr v. Atlantic & North Western R.W. Co.	25 S.C.R. 197	252
King, The, v. MacArthur	34 S.C.R. 570	212
King, The, v. Rogers	43 C.L.J. 623, 6 Can. Ry. Cas. 409	228
Knapp v. Great Western R.W. Co.	6 U.C.C.P. 187	252

Lake Erie & Detroit River R.W. Co. v. Sales	26 S.C.R. 663	378
Leak v. City of Toronto	29 O.R. 685, 26 A.R. 351, 30 S.C.R. 321	228
Lebu v. Grand Trunk R.W. Co.	12 O.L.R. 590, 5 Can. Ry. Cas. 329	147
Lees v. Ottawa & New York R.W. Co.	31 O.R. 567	431
Legge v. Boyd	1 C.B. 92, 14 L.J.C.P. 138, 9 Jur. 307	300
L'Esperance v. Great Western R.W. Co.	14 U.C.R. 173	255
Liverpool & Milton R.W. Co. v. Town of Liverpool	33 S.C.R. 180, 3 Can. Ry. Cas. 80. .	228
Lloy v. Town of Dartmouth	30 N.S.R. 208	253
London & North Western R.W. Co. v. Evershed	3 App. Cas. 1029	429
London Street R.W. Co. v. Brown ...	31 S.C.R. 642, 1 Can. Ry. Cas. 390. .	124
Loup Creek Colliery Co. v. Virginian and Chesapeake & Ohio R.W. Cos.	12 I. C. Rep. 471	49
Lucas and Chesterfield Gas & Water Board, In re	[1908] 1 K.B. 571	59
Lynch v. Nurdin	1 Q.B. 29	273
Lynch v. Third Avenue R.W. Co.	88 N.Y. App. Div. 604	73
Mackley v. Chillingworth	2 C.P.D. 273	247
MacPherson and City of Toronto, In re	26 O.R. 558	228
Malvern Urban District Council v. Malvern Link Gas Co.	83 L.T. 326	244
Mangan v. Atterton	L.R. 1 Ex. 239	285
Manzoni v. Douglas	6 Q.B.D. 145	277
Mason v. Grand Trunk R.W. Co.	37 U.C.R. 163	874
Mason v. Newland	9 Car. & P. 575	299
Mason v. Stokes Bay Pier & R.W. Co.	32 L.J. Ch. 110	223
Maund v. Monmouthshire Canal Co.	4 Man. & G. 452, 3 Ry. Cas. 159, 5 Scott (N.R.) 457, Car. & M. 606, 2 D. (N.S.) 113, 11 L.J. C.P. 317, 6 Jur. 932	299
McArthur v. Northern & Pacific Junc- tion R.W. Co.	17 A.R. 86	252
McCullough v. Minneapolis, St. Paul & Sault Ste. Marie R.W. Co.	101 Mich. 234	73
McDaniel v. Canadian Pacific R.W. Co.	13 B.C.R. 49, 7 Can. Ry. Cas. 34. .	150
McKenzie v. Grand Trunk R.W. Co.	14 O.L.R. 671, 7 Can. Ry. Cas. 47, 12 O.R. 103	468
McMillan v. Grand Trunk R.W. Co.	16 S.C.R. 543	375, 386
McRae and Ontario & Quebec R.W. Co. In re	12 P.R. 282	247
Merchants Bank v. Monteith	10 Pr. R. 334	298
Mercier v. Campbell	14 O.L.R. 639	382
Merritt v. Hepenstal	25 S.C.R. 150	272, 284
Merritton Crossing Case	3 Can. Ry. Cas. 263	22
Metropolitan Board of Works v. Mc- Carthy	43 L.J.C.P. 385	212
Midland R.W. Co. v. Gribble	[1895] 2 Ch. 827	465
Millson v. Smale	25 O.R. 144	306

Missouri Steamship Co., In re.....	42 Ch. D. 321	393
Moberly v. Kansas City R.W. Co.....	98 Mo. 183	328
Moggy v. Canadian Pacific R.W. Co....	3 Man. L.R. 209	328
Morley v. Klondike Mines R.W. Co....	6 Can. Ry. Cas. 183	227
Morrow v. Canadian Pacific R.W. Co..	21 A.R. 149	85, 488
Mulligan v. Curtis	100 Mass. 512	284
Murray v. Canada Central R.W. Co....	8 M. & W. 806	494
Neilson v. Harford	7 A.R. 646	388
Newell v. Canadian Pacific R.W. Co....	12 O.L.R. 21, 5 Can. Ry. Cas. 372..	290
Nichol v. Canada Southern R.W. Co....	40 U.C.R. 583	255
Nichol v. Gocher	12 Man. L.R. 177	228
Nicholson v. Great Western R.W. Co..	5 C.B.N.S. 366	34
North Eastern R.W. Co. v. Wanless..	L.R. 7 H.L. 12	83
Northern Counties Investment Trust v. Canadian Pacific R.W. Co.	13 B.C.R. 130, 7 Can. Ry. Cas. 164.	318
North Shore R.W. Co. v. McWillie ..	17 S.C.R. 511	252
O'Hearn v. Town of Port Arthur....	4 O.L.R. 209, 2 Can. Ry. Cas. 173..	438
Oliver and Bay of Quinte R.W. Co., In re	6 O.L.R. 543, 7 O.L.R. 567, 3 Can. Ry. Cas. 384, 386	245
Oliver v. North Eastern R.W. Co....	L.R. 9 Q.B. 409, 43 L.J.Q.B. 198..	325
Parkdale, Corporation of, v. West ..	12 App. Cas. 602	211
Parker v. Grand Trunk R.W. Co.	3 O.W.R. 651	393
Patterson v. Great Western R.W. Co..	8 U.C.C.P. 89	252
Pearlmoor, The	[1904] P. 286	401
Pearl v. Grand Trunk R.W. Co.....	10 O.L.R. 753, 5 Can. Ry. Cas. 347	94
Peck v. Directors of Staffordshire R.W. Co.	10 H.L.C. 473	415
Pennsylvania, The	19 Wall. 125	285
People, The, v. New York Central & Hudson River R.W. Co.	74 N.Y. 302	326
Phair v. Canadian Northern R.W. Co..	5 Can. Ry. Cas. 334	145
Phillips v. Grand Trunk R.W. Co....	1 O.L.R. 28, 1 Can. Ry. Cas. 399..	81
Phipps v. London & North Western R.W. Co.	[1892] 2 Q.B. 229	34
Piggot v. Eastern Counties R.W. Co..	3 C.B. 229, 15 L.J.C.P. 235.....	326
Pittsburg, Cincinatti & St. Louis R.W. Co. v. Van Houten	48 Ind. 90	482
Plester v. Grand Trunk R.W. Co....	32 O.R. 55, 1 Can. Ry. Cas. 27....	53, 470
Plouffe v. Canada Iron Furnace Co....	5 O.W.R. 758, 6 O.W.R. 500.....	298
Plymouth, Chamber of Commerce, v. Great Western and London & South Western R.W. Cos.	9 Ry. & C. Tr. Cas. 72	48
Plymouth, Devonport & South West- ern Junction R.W. Co. v. Great Western R.W. Co.	10 Ry. & C. Tr. Cas. 68	48
Potvin v. Canadian Pacific R.W. Co....	4 Can. Ry. Cas. 8	290
Powell v. Toronto, Hamilton & Buffalo R.W. Co.	25 A.R. 208	55
Prescott, Town of, v. Connell	22 S.C.R. 147	331
Preston v. Toronto R.W. Co.	11 O.L.R. 56, 13 O.L.R. 369, 5 Can. Ry. Cas. 30, 6 Can. Ry. Cas. 249	73

Price v. Union Lighterage Co.	[1904] 1 K.B. 112	374, 394
Pritchard v. Long	5 T.L.R. 639, 9 M. & W. 606, 1 D. (N.S.) 883, 11 L.J. Ex. 306..	301
Queen, The, v. Essex	17 Q.B.D. 447	54
Queen, The, v. Hall	[1891] 1 Q.B. 747	461
Queen, The, v. Local Government Board	10 Q.B.D. 309	472
Queen, The, v. London & North West- ern R.W. Co.	[1894] 2 Q.B. 512	249
Queen, The, v. South Devon R.W. Co.	15 Q.B. 1043	249
Queen, The, v. Union Colliery Co.	7 B.C.R. 247, 1 Can. Ry. Cas. 499..	461
Railroad Company v. Houston	98 U.S.R. 697	61
Read v. Victoria Station & Pimlico R.W. Co.	1 H. & C. 826	223
Red Cloud Mining Co. v. Southern Pacific R.W. Co.	9 I. C. Rep. 216	35
Regent's Canal Co. v. Ware	23 Beav. 575	223, 233
Regina v. Chesley	16 S.C.R. 306	285
Regina v. Racine	3 Can. Cr. Cas. 446	457
Reid and Canada Atlantic R.W. Co., In re	4 Can. Ry. Cas. 272	317
Rex v. Hemstead	R. & R. 344	463
Rex v. Kerrison	3 M. & S. 526, 16 R.R. 342	324
Rex v. Mountford	[1906] 2 K.B. 814	58
Rex v. Toronto R.W. Co.	10 O.L.R. 26	457
Rex v. Trafford et al.	1 B. & Ad. 874	459
Rhys v. Dare Valley R.W. Co.	L.R. 19 Eq. 93	228
Richard v. Great Western R.W. Co.	[1905] 1 K.B. 68	228
Ries v. St. Louis Transit Co.	179 Mo. 1	73
Robertson v. Grand Trunk R.W. Co.	24 O.R. 75, 21 A.R. 304, 24 S.C.R. 611	380
Root v. Long Island R.W. Co.	114 N.Y. 300	34
Ross v. Clifton	11 Ad. & E. 631	299
Rousillon v. Rousillon	14 Ch. D. 351	393
Ruetsch v. Spry	14 O.L.R. 233	479
Russell v. Men of Devon	2 T.R. 667	212
Ryckman v. Hamilton, Grimsby & Beamsville Electric R.W. Co.	10 O.L.R. 419, 4 Can. Ry. Cas. 457..	252
Ryde v. Isle of Wight.	30 Beav. 616	212
Rysdale v. Wabash R.W. Co.	7 O.W.R. 677	147
Scobell v. Kingston & Pembroke R.W. Co.	3 Can. Ry. Cas. 412	339
Scriven v. Lowe	32 O.R. 290	84, 488
Scott v. Midland R.W. Co.	33 U.C.R. 580	428
Serrao v. Noel	15 Q.B.D. 549	252
Seward v. Vera Cruz	10 App. Cas. 59	318
Sheppard v. Canadian Pacific R.W. Co.	16 O.L.R. 259, 7 Can. Ry. Cas. 374	374, 401
Sherwood v. Corporation of Hamilton.	37 U.C.R. 410	316
Shrewsbury, Earl of, v. Wirral Rail- ways Committee	[1895] 2 Ch. 812	244
Sims v. Grand Trunk R.W. Co.	10 O.L.R. 330, 12 O.L.R. 39, 5 Can. Ry. Cas. 82, 352	74

Skelton v. London & North Western R.W. Co.	36	L.J.C.P. 249, L.R. 2 C.P. 631, 16 L.T. 563, 15 W.R. 925 ...	72, 298
Smith v. Baker	2	H. & M. 498, 4 N.R. 321, 10 L.T. 599	306
Smith v. Buller		L.R. 19 Eq. 473	248
Smith v. Canadian Pacific R.W. Co. ...	21	C.L.T. 193	299
Smith v. Niagara & St. Catharines R.W. Co.	9	O.L.R. 158, 4 Can. Ry. Cas. 220..	327
Smith v. Public Parks Board	15	Man. L.R. 249	211
Spaight v. Tedcastle	6	App. Cas. 217	124
Squire v. New York Central R.W. Co. ...	98	Mass. 239	394
Stebbing v. Metropolitan Board of Works		L.R. 6 Q.B. 37	228
St. Mary's Creamery Co. v. Grand Trunk R.W. Co.	5	O.L.R. 742, 8 O.L.R. 1, 2 Can. Ry. Cas. 122, 3 Can. Ry. Cas. 447	383, 405
Stockport Ragged, Industrial and Reformatory Schools, In re		[1898] 2 Ch. 687	313
Stockport, Timperley & Altringham R.W. Co., In re	33	L.J.Q.B. 251	57
Stott v. Meanock	31	L.J. Ch. 746, 6 L.T. 592, 10 W.R. 605	306
Strick v. Swansea Canal Co.	16	C.B.N.S. 245	34
Stuart v. Mott	33	S.C.R. 384	284
Stubley v. London & North Western R.W. Co.		L.R. 1 Ex. 13	72
Swindon, Marlborough & Andover R.W. Co. v. Great Western and London & South Western R.W. Cos.	4	Ry. & C. Tr. Cas. 349	48
Tabb v. Grand Trunk R.W. Co.	8	O.L.R. 203, 4 Can. Ry. Cas. 1 ..	290
Tawney v. Lynn & Ely R.W. Co.	16	L.J. Ch. 282	223
Thompson v. Gibson	7	M. & W. 456	253
Toms v. Corporation of Whitby	35	U.C.R. 195, 37 U.C.R. 100....	325
Tooke v. Bergeron	27	S.C.R. 567	298
Torrop v. Imperial Fire Insurance Co.	26	S.C.R. 585	388
Toronto R.W. Co. v. Hendrie	17	P.R. 199	223
Toronto R. W. Co. v. King		[1908] A.C. 260, 7 Can. Ry. Cas. 408	91, 438
Torrence v. Gibbins		D. & M. 226, 13 L.J.Q.B. 36, 7 Jur. 1158, 5 Q.B. 297	293
Tottenham Urban District Council v. Williamson & Sons	65	L.J.Q.B. 591	364
Trimble v. Hill	49	L.J.C.P. 49	365
Trimble v. Miller	22	O.R. 500	388
Turner v. Isnor	25	N.S.R. 428	284
Tynemouth and Duke of Northumberland, In re	89	L.T. 557	228
Union Colliery Co. v. The Queen	31	S.C.R. 81, 1 Can. Ry. Cas. 511..	461
Union Steamship Co. of New Zealand v. Melbourne Harbour Trust Commissioners	9	App. Cas. 365	472
United Land Co. v. Great Eastern R.W. Co.		L.R. 19 Eq. 158	475

CASES CITED.

xxi

Vallee v. Grand Trunk R.W. Co.	1 O.L.R. 224, 1 Can. Ry. Cas. 338	74, 120
Vogel v. Grand Trunk R.W. Co.	2 O.R. 197, 10 A.R. 162, 11 S.C.R. 612	382
Wade v. Keefe	22 L.R. Ir. 154	298
Waite v. North Eastern R.W. Co. ...	E. B. & E. 719	278
Wakelin v. London & South Western R.W. Co.	12 App. Cas. 41, 56 L.J.Q.B. 229, 55 L.T. 709, 35 W.R. 141, 51 J.P. 404	298
Wallace v. Grand Trunk R.W. Co....	16 U.C.R. 551	252
Wallasey Local Board v. Gracey	56 L.J. Ch. 739	364
Wednesbury, Corporation of, v. Lodge Holes Colliery Co.	76 L.J.K.B. 68	364
White v. Commissioners of Works ...	22 L.T. 591	228
Whitehouse v. Fellowes	10 C.B.N.S. 765	253
Wildes v. Russell	L.R. 1 C.P. 722	223
Williams v. Great Western R.W. Co..	L.R. 9 Ex. 157	282
Williams v. Jones	11 Ad. & E. 643	300
Winterbottom v. Lord Derby	L.R. 2 Ex. 316	212
Woeckner v. Erie Electric Motor Co..	176 Penn. St. 451	284
Wood v. Charing Cross R.W. Co. ...	33 Beav. 290	212
Yeates v. Grand Trunk R.W. Co. ...	14 O.L.R. 63, 7 Can. Ry. Cas. 4..	148
York Street Bridge Case	4 Can. Ry. Cas. 62	22
Zimmer v. Grand Trunk R.W. Co....	21 O.R. 628	318

CANADIAN RAILWAY CASES.

JURISDICTION—LOCATION—PRIORITY.

ESSEX TERMINAL R.W. Co. v. WINDSOR, ESSEX & LAKE SHORE
RAPID R.W. Co.

(40 S.C.R. 620.)

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS
FOR CANADA.

*Board of Railway Commissioners—Jurisdiction—Location of railway—
Consent of municipality—Crossing—Leave of Board—Discretion.*

On 12 August, 1905, the Township of Sandwich West passed a by-law authorizing the W., E., etc., Ry. Co. to construct its line along a named highway in the municipality, but the powers and privileges conferred were not to take effect unless a formal acceptance thereof should be filed within thirty days from the passing of the by-law. Such acceptance was filed on 12 Sept., 1905. This was too late and on 20 July, 1907, the council of Sandwich West and that of Sandwich East respectively passed by-laws containing the necessary authority.

In April, 1906, the location of the line of the E. T. Ry. Co. was approved by the Board. In June, 1906, the Board made an order allowing the W. E., etc., Ry. Co. to cross the line of the C.P.R. In March, 1907, another order respecting said crossing was made and also an order approving the location of the W. E. Ry. Co., the municipal consent being obtained three months later.

The E. T. Ry. Co. applied to the Board to have the orders of June, 1906, and March, 1907, rescinded and for an order requiring the W. E. Ry. Co. to remove its track from the highway at the point where the applicant proposed to cross it to discontinue its construction at such point or, in the alternative, for an order allowing it to cross the line of the W. E. Ry. Co. on said highway. The applicants claimed to be the senior road and that the W. E. Ry. Co. had never obtained the requisite authority for locating its line. On a case stated to the Supreme Court by the Board.

Held, that the Board had power to refuse to set aside the said orders; that the by-laws passed in July, 1907, were sufficient to legalize the construction of the W. E. Ry. Co.'s line on said highway; and that the Board can now lawfully authorize the latter company to maintain and operate its railway thereon.

Held, further, that leave of the Board is necessary to enable the E. T. Ry. Co. to lay its tracks across the railway of the W. E. Ry. Co. on said highway.

Held, also, that the Board, in exercise of its discretion has power by order to authorize the maintenance and operation of the W. E. Ry. Co. along said highway and to give leave to the E. T. Ry. Co. to cross it and the line of the C.P.R. near the present crossing and to apportion the cost of

maintaining such crossing equally between the two companies instead of imposing two-thirds thereof upon the E. T. Ry. Co. as was done by a former order not acted upon; and to order that if the E. T. Ry. Co. finds it necessary, in its own interest to have the points of crossing differently placed it should bear the expense of removing the line of the W. E. Ry. Co. to the new point of crossing.

Present: Girouard, Davies, Idington, MacLennan and Duff, JJ.

APPEAL on a case stated by the Board from a decision of the Board of Railway Commissioners for Canada, 7 Can. Ry. Cas. 109, on application of the Essex Terminal Co.

The material facts are stated in the above headnote. The text of the questions submitted will be found in the judgment of Mr. Justice Idington.

Armour, K.C., and Coburn, for the appellants.

Matthew Wilson, K.C., for the respondents.

The appeal was heard on the 5th of June, 1908.

October 6, 1908. GIROUARD, J.:—I agree in the opinion stated by Mr. Justice Duff.

DAVIES, J.:—I agree with the general reasoning of the late Chief Commissioner Killam when proposing the judgment of the Board of Railway Commissioners on the application of the appellant and, in answer to the sixth question submitted to us in the stated case, I would say that the order proposed to be made by the Board is one which, in the exercise of its discretion, the Board has power to make.

I would also answer questions two, four and five in the affirmative. In view of these answers, it does not seem necessary to answer questions one and three.

IDINGTON, J.:—This is a case submitted by the Board of Railway Commissioners in the lifetime of the late Chief Commissioner.

We are asked to answer some half dozen questions submitted. In order to understand thoroughly the bearing of these ques-

tions one would have to read the case and the judgment of the late Chief Commissioner.

Briefly put, however, the contest between the two railway companies is to have the senior right of the one over the other determined.

Incidentally to that determination, it is said that by reason of settled jurisprudence of the Board there ought to flow results much different from those settled by the Board in the order now in question.

I am not prepared to assent to this contention.

However desirable it may be to observe as a general rule as between contesting railway companies that, presumptively, a senior may or even should have advantages over its junior in settling such questions as have arisen between those before us, it would never do for us to treat such settlement of prior right in regard to such contests as so determined and fixed by law as to remove all discretion from the Board in the consequent results of such a matter as adjusting the respective burthens to be borne by the contestants. It was quite competent for the Board to have said here, as the judgment of the late Chief Commissioner practically does say, that, assuming the legal status of the respondent company was not technically that of senior, yet, in substance, it might by reason of the march of events be treated as in such a position as to have claimed seniority but for an unfortunate mistake made in the legal proceedings that were designed to complete its title and to give it that seniority.

This position of the Board was the more apparently right when we consider that so much had been done on the faith of a supposed acquired right as to give rise to quite exceptional considerations and quite exceptional treatment which was given.

The respondent company, in my opinion, had not until the 20th of July, 1907, acquired, as it supposed it had, the right to build upon the highway.

But, notwithstanding that, I agree with the late Chief Commissioner in thinking that if an application were made to the

Board merely to approve of plans locating a proposed railway and the order were confined to that approval of location and in no way to be assumed to be a determination of right to proceed to build, regardless of all other considerations, or consideration, such as the title in law to go upon or over any property covered by the location adopted and build thereupon, it could be properly made.

The orders complained of so far as before me (for they are not all copied in the copy of the case I have), do not seem expressly confined to this question of location and might be read as going beyond it, but for the explanation given in the judgment I have referred to, and the statutory declaration in section 159 of the Railway Act as to the meaning of such an order.

That section, sub-section 2, reads as follows:

“The Board by such sanction shall be deemed to have approved merely the location of the railway and the grades and curves thereof, as shewn in such plan, profile and book of reference, but not to have relieved the company from otherwise complying with this Act.”

I doubt if this entirely covers this case, for it is not a question here of relief from otherwise complying with the Railway Act that is to be guarded against, but that the respondent company “should not be relieved from” otherwise complying with the Dominion Act which declared the work in question to be for the general advantage of Canada.

It is not the Railway Act, but this latter Act that prohibited the laying down of a railway upon any highway without the consent of the municipal council; which was not effectually got till after the 20th of July, 1907.

If the orders in question are to be construed as the following quotation from the judgment of the late Chief Commissioner indicates they were intended to be construed, then I see nothing in them to complain of.

“The land across which a railway is sought to be located may belong to the Crown, or be a part of an Indian Reserve,

and the consent of the Governor in Council to its use or occupation by the company may be necessary under sections 172 or 175 of the Railway Act, or it may have been reserved for naval or military purposes, when the license and consent of the Crown under the hand and seal of the Governor-General is required by section 174. It may belong to another railway company, in which case the new company cannot use or occupy it without the leave of the Board under section 176, which, in approving the location plan, would not bind itself to grant such leave. The line may cross navigable waters, when the site, as well as the plans, must be approved by the Governor in Council, under section 233.

In deciding whether to sanction plans and profiles shewing the proposed location of a railway, the Board does not usually consider matters of this kind or questions as to the existence of public highways along the route, or whether such highways or railways shall be crossed by the proposed new railway, or, if so, where or how, or the measures to be taken for the safety of the public or otherwise in connection with such crossings, or whether, or where, the railway shall be operated upon or along a highway, or on what portions thereof, or the provisions to be made in connection with the same; and orders sanctioning such locations should not be considered as impliedly authorising obstruction of highways by railway works.

This is the settled jurisprudence of the Board.

And it was not a necessary condition precedent to the approval of the location plans that the party should first have the consent of the municipal authority to the construction of the railway upon the public highway. This might be left until the company ascertained whether the proposed location would meet with the approval of the Board from an engineering standpoint."

Can we say, however, that the orders do not go further?

Are they in such shape as to enable us to categorically answer the questions put regarding them?

I still adhere to the interpretation I give to the case of the *Montreal Street Ry. Co. v. Montreal Terminal Ry. Co.*, 36 S.C.R. 369, at page 391, to what, in substance, is now in sections 54 and 56, sub-section 9, of the Railway Act, Revised Statutes of Canada, 1906, ch. 37.

We are told that a much wider effect is given by some Courts to unauthorized orders of the Board that I am disposed to give and that a danger exists unless the orders in question are repealed that they may have such a wider effect than intended by the Board as above set forth.

Having regard, however, to the limitation, by section 159 above quoted, in regard to the meaning of such orders as within its scope, and the cognate nature of the orders in question, I think they can be similarly limited and ought to be read as so limited. As to the rescinding of any order beyond the jurisdiction of the Board, the doing so must be to a certain extent a matter of discretion.

In the view I have taken and referred to as above expressed, there may be for the protection of those who acted under such an order, as exceeded the jurisdiction of the Board, a duty to let the order stand for that purpose.

I assume, of course, that in default of such need or similar proper purpose, it is desirable to rescind any order found not to have fallen within the jurisdiction making it.

I would answer, therefore, the questions submitted, as follows:—

Q. (1)—Whether the Board of Railway Commissioners had jurisdiction, prior to the 20th of July, 1907, to make the orders above complained of and each of them?

A.—Yes, so far as approving merely the location of the railway and the grades and curves thereof as shewn in a plan, profile and book of reference such as the Railway Act contemplates, but not to operate in the way of relieving the company from the condition imposed upon it of obtaining consent of the municipi-

pality or municipalities having jurisdiction over the highway in question.

Q. (2)—Whether the Board of Railway Commissioners had power to refuse to set aside its said orders so complained of?

A.—Yes.

Q. (3)—Whether, in view of the said by-law of the said Township of Sandwich West, passed in the year 1905, and the acceptance thereof at the time and in the matter herein above set forth, and the construction of the railway of the Windsor-Essex Company upon and along the said gravel road, without objection on the part of the said municipality of Sandwich West, the Windsor-Essex Company is now entitled to maintain and operate its railway upon and along the said gravel road?

A.—No.

Q. (4)—Whether the said by-laws of the said municipalities of the Township of Sandwich East and Sandwich West, respectively passed on the 20th of July, 1907, are valid and sufficient to make lawful the construction and operation of the railway of the Windsor-Essex Company upon and along the said gravel road; and whether the Board of Railway Commissioners may now lawfully authorize the Windsor-Essex Company to so maintain and operate its said railway upon and along the said gravel road?

A.—Yes.

Q. (5)—Whether the leave of the Board of Railway Commissioners is necessary to enable the Terminal Company to lay its tracks across the railway of the Windsor-Essex Company upon the said gravel road?

A.—Yes.

Q. (6)—Whether the order proposed to be made by the said Board as aforesaid is one which, in the exercise of its discretion, the said Board has power to make?

A.—Yes.

I think there should be no costs to either party.

MACLENNAN, J.:—I agree in the opinion stated by Mr. Justice Duff.

DUFF, J.:—The late Chief Commissioner of the Board of Railway Commissioners has summarized the views expressed by him in his judgment in the following passage:—

“Then the position which we have is this: The railway of one company has been constructed along a public highway without the necessary authority from the municipality or the Board; the required consent of the municipality or the municipalities has since been obtained, but not the requisite leave of the Board; with the authority of the Board it crosses, upon that highway, another railway; another company, having its location plan properly sanctioned by the Board and the leave of the Board to cross the highway on line of that location, seeks to have the existing railway removed from the highway or to be allowed to cross it at the expense of the former, and to have the orders sanctioning the location plans of the first company and giving leave to that company to cross the previously existing railway, set aside.

“While, as I have said, I think the Board has jurisdiction to require the removal of the rails from the highway at the point where the Essex Terminal Railway Company has leave to cross, I do not think that we are bound to do this. I think that we are entitled to exercise our discretion, in view of all the circumstances; that, in the fair exercise of that discretion, we may now authorize the maintenance and operation of the Windsor, Essex and Lake Shore Rapid Railway Co. along the gravel road, and give leave to the Essex Terminal Railway Company to cross it and the Canadian Pacific Railway Company's line, near the present railway crossing in such manner and with such protective appliances as our engineer shall recommend, but varying the condition as to the apportionment of the cost of maintenance and operation by dividing it equally between the two companies, instead of imposing two-thirds upon the Essex Ter-

minal Railway Company. But, if the Essex Terminal Railway Company still finds it necessary for its own interests to have the point or points of crossing differently placed, that company, should bear the expense of removing the line of the Windsor, Essex and Lake Shore Railway to the new point of crossing.

“In such a case as this, I do not think that we are bound to recognize that an absolute right of priority in regard to such crossings is acquired by priority of sanction of location plans, or priority of leave to cross or run along highways. The two railways were being constructed almost simultaneously. The original by-law of the Township of Sandwich West failed to take effect only through one day's default and, possibly, through a slip in the method of attempted acceptance, but for which the railway would have been lawfully upon the highway when the Dominion Act was passed, and long before the Essex Terminal Railway Company obtained the Board's leave to cross the highway. The case appears to be one for the exercise of the Board's discretion.”

With every word of this passage I agree.

It follows that questions two, four, five and six should all be answered in the affirmative; and, in this view, there would appear to be no necessity for expressing any opinion upon either of questions one or three.

Cunningham & Lyon, for the appellants.

Purdom & Purdom, for the respondents.

RATES ON STONE—MILEAGE BASIS.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.

DOOLITTLE & WILCOX v. GRAND TRUNK & CANADIAN PACIFIC
RY. COS.*(Stone Quarry Rates Case, No. 2965.)**Rates on stone—Mileage basis—Existing industries—Railway Act, sec. 323.*

In the making of rates for the carriage of freight the question of the distance of haul while important to be considered is in many cases a minor consideration.

Where large quarries have been established and capital invested for many years upon the faith of low rates for the carriage of stone being given; upon application by the railway companies for an increase of five cents a ton within certain areas, an application was made by the operators to establish new rates upon a mileage basis for points within a radius of fifty miles from the principal market.

Held, that as the adoption of such a rate would destroy many existing industries, and in no way reduce the price of stone to the consumer, but enure very largely to the benefit of the applicants, or some of them, the application should be refused, and a new scale of rates as recommended by the Chief Traffic Officer based upon the existing system was approved.

APPLICATION of the stone quarry operators for an order under section 323 of the Railway Act disallowing the proposed increase in freight rates for the carriage of stone on the roads of the Canadian Pacific and Grand Trunk Railway Companies.

Heard at Ottawa on the 6th and 7th May, 1908.

Mr. J. S. Ewart, K.C., appeared on behalf of fourteen stone quarry operators who are doing business in eight places.

Mr. E. W. Beatty, appeared for the Canadian Pacific Ry. Co.

Mr. M. K. Cowan, K.C., appeared for the Grand Trunk Ry. Co.

July 29, 1908. THE CHIEF COMMISSIONER:—This application is made by a number of stone quarry operators for an order, under section 323 of the Railway Act, disallowing the proposed

increase in freight rates for the carriage of stone upon the Grand Trunk and Canadian Pacific Railways. The increase was 5c. per ton within certain areas. The case, however, upon the hearing was much enlarged and assumed the feature of not being a serious attack upon the proposed 5c. increase, but rather more a proposition submitted for the establishment of entirely new rates, upon a mileage basis. The applicants represent quarries in operation at some eight points, all within 50 miles of Toronto, the principal market. The applicants are not unanimous in their views; and one of them has communicated to the Board his satisfaction with the 5c. increase, provided the rates are not reduced from individual quarry points.

I do not think the attack upon the 5c. increase has been successful. The stone rates to Toronto have always been low; and I am constrained to think that the case would not have been given the attention it has received, had it not been with the hope of persuading the Board to adopt a mileage basis for stone rates.

Now, it is apparent that the quarries located at greater distances from Toronto than the applicants are vitally interested in this matter, as upon this low grade material, with competition keen and prices cut, any disturbance in rates might, and doubtless would, work to the irreparable injury of many interests which have had no notice of this application and no opportunity of being heard. So, had I formed the opinion that it was the duty of the Board to adopt in whole or in part the basis of rates argued for by the applicants, I should have directed these other interests to be notified and given an opportunity to present their views before disturbing the existing order of things. The fundamental ground of the application is to have mileage form the sole basis in making these rates. To those who have not had experience in rate-making the argument that distance must be the principal factor appeals with force; but the history of these cases shews that, while it is of course to be considered, yet in many instances it is a minor matter; and I am not aware that either in England or the United States it has been held

by the rate-controlling tribunals that they are bound to regard mileage as the controlling factor. If the argument of Messrs. Doolittle & Wilcox were acceded to, it would have the effect of destroying large industries where proprietors have in good faith invested their money and built up a business connection, and turning over to these quarries in the short-haul zone the control of the Toronto market. Of course, no such destruction of capital and consequent hardship upon innocent persons can be permitted, if any other course is open. There are many reported cases in which the Interstate Commerce Commission has paid little or no attention to distance of haul; and the business interests and demands of this country are much the same as there.

The proposal submitted and elaborated in evidence by Mr. Doolittle was ingenious and displayed much industry and care in preparation. The plan suggested was that for the first forty miles the rate be $\frac{1}{2}$ cent per ton per mile plus 25 cents per ton terminal charges; from forty-one to seventy miles, $\frac{1}{2}$ cent per ton per mile plus 20 cents per ton terminal charges; and above seventy miles, $\frac{1}{4}$ cent per ton is added to the 70-mile rate. Now, the rate of $\frac{1}{2}$ cent per ton per mile for short hauls is admitted by Mr. Doolittle to be the lowest stone rate; and this, applied to the longest haul, is his basis. The objection to his terminal charge is that terminal cost varies; and he provides for this cost only at delivery points and not at the quarries. Now, there is nothing that requires this Board to compel the carriers to frame their rates upon a basis of the kind proposed; and when it appears that the adoption of such a rate basis would work destruction to many existing industries, enure very largely to the benefit of the applicants, or some of them, and probably in no way reduce the price of stone to the consumer—possibly increase it—I am unable to see why the application should succeed. Comparison with rates upon other low-grade commodities was made; but when each instance was investigated, reasons for differences appeared. The reason for low rates upon clay from Waterdown to Hamilton and other points, and upon marl, iron

ore, and the like, is that these rates are based upon the re-shipment by rail of the finished products of these raw materials. Low coal rates, of course, result from the competition of water carriers.

It strikes me as not unreasonable that the quarry near Toronto should enjoy the benefit of its natural location; but these nearby quarries have submitted for years to the establishment of these artificial rates by the companies, and without complaint have seen their outside competitors invest their capital and develop their industries; and it could hardly be regarded as fair that the short-haul quarry proprietors should, through the instrumentality of this Board, be enabled entirely to destroy their more distant brethren.

The Chief Traffic Officer has made some revision in the scale of rates from some of the shipping points; and, as revised by him, the following will be the shipping points, distances, and rates:—

From	Miles.	Rates in cents per ton.
Cooksville.	12	45
Georgetown.	27	55
Glen Williams	30	55
Milton	30	55
Terra Cotta	33	55
Campbellville.	36	55
Cheltenham.	35	55
Inglewood.	38	55
Dundas.	42	55
Schaw.	43	55
Credit Forks	43	55
Cataract.	46	55
Orangeville.	46	55
Guelph.	47	55
Alton.	49	55
Galt.	55	55
Elora.	61	55

From	Miles.	Rates in cents per ton.
Fergus.	64	55
Shelburne.	62	60
Hagersville.	67	60
Kirkfield.	73	60
Cameron.	74	60
Niagara Falls	77	60
Fells.	86	60
Burnt River	91	60
Longford	92	60
St. Mary's	97	60
Owen Sound	119	60
Ivanhoe	120	60
Crookston	133	65

Order accordingly.

JURISDICTION—PROTECTIVE MEASURES.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.

NAYLOR V. WINDSOR, ESSEX & LAKE SHORE RAPID RY. CO.

(Case No. 727.)

Jurisdiction of the Board—Electric railway—Power line—Protection of the public and owners of other lines—By-law—1 Edw. VII. ch. 92 (O.)—6 Edw. VII. ch. 184 (C.)—Railway Act, secs. 235, 237, 238.

The Windsor, Essex & Lake Shore Rapid Railway Company incorporated by Provincial Statute to construct an electric railway through the Town of Essex built its line on Talbot Street under the authority of a municipal by-law which provided that its poles and wires should not interfere with any then existing poles or wires of any other person or company. The railway works were declared to be for the general advantage of Canada. The company's wires and poles when constructed interfered with existing telegraph, telephone and electric light poles and wires (the latter belonging to one Naylor, erected under an agreement with the town) and created danger by the escape of electrical current therefrom.

Held, that if the railway and power line were constructed before the passing of the Dominion Act no order was necessary to authorize their subsequent maintenance and use, but if not, then leave was required under sections 235 and 237.

Quære, if part only of the work was done before the Act and part afterward.

Assuming that the work was lawfully done before the passing of the Dominion Act the Board has power under section 238 to require the company to execute such works or take such measures as appeared to the Board best adapted to remove or diminish the danger.

An agreement having been made with the approval of the Board for the use by Naylor of the company's poles for carrying his wires, order accordingly, the company being ordered to pay the costs of the proceedings.

THE application was heard at Chatham on November 1st, 1907.

E. A. Wismer, appeared for the applicant Naylor.

Matthew Wilson, K.C., appeared for the Windsor, Essex and Lake Shore Rapid Ry. Co.

The facts are fully set out in the judgment of the Chief Commissioner.

December 24, 1907. THE CHIEF COMMISSIONER:—The Windsor, Essex and Lake Shore Rapid Railway Company was incorporated by Act of the Legislature of the Province of Ontario passed in the year 1901, 1 Edw. VII. ch. 92. By that Act, the company was authorized to construct a railway, to be operated by electricity, from a point in or near the City of Windsor, through the Towns of Essex and Leamington to a point in or near Wheatley, all in the County of Essex. The Act provided that the railway, or any part thereof, might be carried along and upon such public highways as might be authorized by the by-laws of the respective corporations having jurisdiction over the same.

By Act of the Parliament of Canada, passed in the year 1906, 6 Edw. VII. ch. 184, the railway works which the company had been empowered to undertake by virtue of the Acts of the Legislature of Ontario relating to it, were declared to be for the general advantage of Canada. That Act provided that the Railway Act, 1903, and amendments thereto, should there-

after apply to the company and the said works to the exclusion of the Electric Railway Act of Ontario or any provision of the Company's Act of incorporation inconsistent therewith, but that nothing therein should affect any action theretofore taken pursuant to powers in such Acts contained.

The Dominion Act also provided that the company should not construct or operate its line of railway along any highway or other public place without first obtaining the consent (unless such consent had already been obtained) expressed by by-law of the municipality having jurisdiction over such highway or other public place, and upon terms to be agreed on with such municipalities.

On the 7th of April, 1902, the municipal council of the Town of Essex passed a by-law granting to the company, subject to the terms and conditions contained in the by-law, the right to construct its line through the Town of Essex and along the highway known as Talbot Street therein. The by-law provided that the poles and wires of the railway company should be so placed as not to interfere with any poles or wires of any other person or company as then (at the time of the passing of the by-law) existing. The by-law also provided that the franchise thereby granted should be subject to all other franchises, rights or privileges in respect of Talbot Street, within the town, theretofore enjoyed by any person or persons, company or companies.

On the 19th of February, 1900, an agreement in writing was made between the Town of Essex and C. E. Naylor, under which Naylor agreed to furnish certain lamps for street lighting in the town, and to keep the same burning each night. At the time of the passing of the by-law mentioned, Naylor had upon and along Talbot Street a number of poles and wires used for the purpose of furnishing power for the lighting of the streets and the lighting of private premises. The railway company constructed a line of railway along Talbot Street, and put up on the street poles and wires for the purpose of conveying

electrical power for the operation of the railway. In doing this, it interfered to some extent with Naylor's poles and wires, and placed its own power wires in such a position as to be, in some cases, so near to Naylor's wires that there was a risk of the escape to them from the railway company's wires of heavy electrical currents, and that there was also risk of the current so escaping through the falling of wires upon the railway company's power wires. There were also upon the street, when the railway was constructed, poles and wires used for the purpose of telegraphic and telephonic communication, with respect to some of which there was similar risk.

The evidence shewed that electrical current had escaped from the company's power wire to Naylor's wires and thence to private premises where it had caused damage. Both Naylor and the Town of Essex made complaint to the Board in the matter, and asked that steps be taken to remove the danger. The evidence did not shew when the railway was constructed, or when the railway company's poles and wires were placed upon the street, or whether these things were done before the passing of the Act declaring the company's railway works to be for the general advantage of Canada.

If the railway and the power line were constructed before the passing of the last mentioned Act, it appears to me that no order of the Board was necessary to authorize their subsequent maintenance and use. If none of these things were done before the passing of that Act, I think that the railway company required the leave of the Board under sections 235 and 237 of the Railway Act for the purpose. If part only of the work was done before the Act and a part afterward, difficult questions might arise as to the necessity for such leave, under which the actual facts might be material; and I, therefore, refrain from expressing any opinion upon such questions.

For the present I assume that the work, or sufficient of it, was done before the passing of the Dominion Act to render the maintenance and operation of the railway upon and along

the street lawful. If the company were coming for leave to construct and operate the railway upon the street, the Board would clearly, in my opinion, have the power to impose upon the company such conditions as it might see fit for the purpose of protecting existing telegraph, telephone, or electric lighting lines, and for the purpose of protecting the public from the danger necessarily arising from the escape from the railway company's wires of heavy electrical currents to and over any such other lines; and it appears to me equally clear that, if the railway and its power lines were lawfully upon the street when the Dominion Act was passed, the Board still has the power, under section 238 of the Railway Act, to impose similar conditions upon the railway company or to make orders requiring the railway company alone, or other parties interested or affected, or the company and any such other party or parties jointly, to execute such works or take such measures as, under the circumstances, appear to the Board best adapted to remove or diminish the danger.

Both by the terms of the Railway Act and by those of the Act declaring its works to be for the general advantage of Canada, the company became a railway company subject to the terms of the provisions of the Railway Act so far as applicable. The poles and wires erected by the company formed a necessary and integral part of the railway works. In exercising the jurisdiction conferred upon it by section 238, the Board must take into consideration the nature of the works and of the protective measures which that nature renders necessary, just as in the case of a railway operated by the power of steam.

The case is, therefore, one for the exercise of the Board's discretion as to the measures to be taken and the party or parties who are to do the work or bear the expense. The Board's electrical engineer has visited the locality and reported upon the measures which he deems necessary for the protection of the public and of the owners of other lines. The by-law of the town authorizing the construction of the railway upon and

along the street required that the railway company's poles and wires should be so placed as not to interfere with any poles and wires of any other person or company existing at the time of the passing of the by-law. Whether a formal by-law of the town council was necessary to enable Naylor lawfully to place and maintain his lines upon the public street, we must presume that they were there with the knowledge and the tacit consent of the municipal authorities.

Under these circumstances, it appears to me that the railway company should adopt the measures and bear the expense necessary to the protection of the existing lines and of the public.

At the hearing, Naylor's counsel expressed his client's willingness, if the railway company would construct the necessary lines for the purpose of enabling him to transmit power across the street where this was necessary for connections on the other side, and would allow the use of its poles on the opposite side of the street, to do the work and bear the expense of running his wires along those poles.

This appears to me to be a reasonable solution of the difficulty, and an order should, in my opinion, go accordingly; the order to be drawn under the advice of the electrical engineer and to direct the railway company to provide and place, in accordance with the recommendations of the electrical engineer, the wires necessary for this purpose, and to allow Naylor the use of its poles for carrying his wires, the same to be placed to the satisfaction of the Board's electrical engineer.

The electrical engineer should be asked to advise upon the company's letter of 14th December, and as to whether, in view of that letter, any protection is required of other wires than Naylor's.

I think that the railway company should pay Naylor the costs incurred by him in respect of the proceedings before the Board in this matter, and that the order should so provide.

It does not appear to be necessary to enter into consideration

of the objections to the by-law or to Naylor's authority for the use of the street, or to any of the other questions of law raised by counsel. I would put the case wholly as one for the exercise of the Board's discretion under the express terms of the Railway Act, and impose the expense upon the railway company in view of the terms of the by-law which was necessary to enable it to use the street.

JURISDICTION—JUNIOR AND SENIOR COMPANY.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.

BELL TELEPHONE CO. v. WINDSOR, ESSEX & LAKE SHORE
RAPID RY. CO.

(Case, No. 3784.)

Jurisdiction of the Board—Telephone wires crossing electric railway—Protective works—Junior and senior company—The Railway Act, secs. 237, 238.

The Board has no jurisdiction under sections 237 and 238 of the Railway Act to order the junior company at a crossing, where the wires of a telephone company are carried over an electric railway, to bear the cost of certain changes in the construction of the lines of the senior company and of certain protective appliances rendered necessary by reason of the construction and operation of the railway of the junior company, where such alterations were made by the senior company without having previously obtained an order from the Board for the making of the same.

THE application was heard at Chatham on the 20th of October, 1908.

L. McFarlane, appeared for the Bell Telephone Company.

Matthew Wilson, K.C., appeared for the Windsor, Essex & Lake Shore Rapid Ry. Co.

October 20, 1908. THE CHIEF COMMISSIONER:—We are all of one mind on this application, and there is no reason why it should not be disposed of now.

The contention advanced by the Bell Telephone Company is in effect that where a dangerous situation is brought about, like the one disclosed by the evidence, the company imperilled may, without the leave of the Board, or without making any application to the Board, take into its own hands the remedying of the danger, the removal of the danger, and make whatever expenditure it deems reasonable, and later on apply to the Board for an order for payment against the railway company.

It does not seem to me that any reading of section 237 gives the Board authority to make such an order. This section was intended to apply and does apply clearly to a situation rendered dangerous. There, upon an application made to the Board, the Board may take such measures as, under the circumstances, appear to the Board the best adapted to remove or diminish the danger arising or likely to arise. It seems to me the whole object of the section was to place under the jurisdiction of the Board authority to deal with the danger. The Board itself was to exercise its jurisdiction in the ordering of such protective measures as it might deem expedient.

Then section 238 simply carries that a step farther, and gives the Board authority to do the like things, although the railway has been located. Section 237 applies to the situation where the application is made for leave to locate or approve.

Now, it seems to me it would be opening the door far too wide to delegate, or for the Board to assume it had the right to delegate to the parties themselves to decide what protection should be provided, when the statute itself says the Board shall exercise that jurisdiction.

Then counsel asked leave to amend, and to treat his case as if he were applying now for an order for protection, and that the Board should adopt the protection that has been decided upon by the applicants, and order compensation. We think at this stage, notwithstanding our power to make almost any sort of an amendment, that it would hardly be proper to make such an amendment as that. And, even if we did, it would still open up

the same difficulty, and we would still be confronted with the same situation, namely, that the company itself has made the changes, and the case would be left pretty much as it is upon the present record.

So far as the merits are concerned, I am personally entirely with the applicants. Of course we have not heard all the evidence that Mr. Wilson had at hand, but it seems to me quite impossible to deny that the Bell Telephone Company have been put to expense by reason of the location of this danger beneath their wires. I think what they did was entirely reasonable. They were acting, as has been reported in the *Naylor case*—they were simply following out what the engineer of the Board recommended in that case. Whether they would be in fairness entitled to all they claim, is quite another matter, but the merits are not before us, and only incidentally do I refer to it in the way that I have. It comes back to the jurisdiction of the Board, and I am quite clear, and in that view my colleagues join with me, that section 237 does not authorize the Board to make an order of the kind asked for.

The application will be dismissed, but under the circumstances without any costs.

NOTE.

In the *Merriton Crossing case*, 3 Can. Ry. Cas. 263, the Board held it had no jurisdiction to make an *ex post facto* order. The *York Street Bridge case*, 4 Can. Ry. Cas. 62, is to the same effect.

UNDUE DELAY—FREIGHT TRAFFIC.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.

RE LORD'S DAY ACT AND GRAND TRUNK RY. CO.

(Case No. 2450.)

Jurisdiction of the Board—Freight traffic—Undue delay—The Lord's Day Act, R.S.C. ch. 153, sec. 12—Railway Act, sec. 2 (32).

The Grand Trunk Railway Company applied to the Board for an order under sub-sec. *x* of sec. 12 of the Lord's Day Act, R.S.C. ch. 153, permitting it to do certain work on the Lord's Day in order to prevent undue delay to traffic.

Held, upon the evidence that in order to prevent undue delay to traffic the applicants may be permitted on the Lord's Day—

1. To unload grain carriers and load grain into cars at Ontario Lake Ports between September 15th in any year and June 1st in the following year.
2. Between said dates do such work as may be necessary to furnish at such ports a continuous railway service for carrying grain from elevators and vessels.
3. Perform all work necessary for delivery to their destinations of freight cars in transit when the Lord's Day began. Other railways carrying grain from said ports are entitled to the like privileges.

THIS application was heard at Ottawa on September 1st, 1908.

M. K. Cowan, K.C., and *W. W. Pope*, for the Grand Trunk Ry. Co.

E. W. Beatty, for the Canadian Pacific Ry. Co.

Geo. F. Macdonnell, for the Canadian Northern Ry. Co.

Wallace Nesbitt, K.C., for the Pere Marquette Ry. Co.

R. U. McPherson, K.C., for the Lord's Day Alliance.

W. S. Buell, for the Department of Railways and Canals.

Edward Meek, K.C., for the Rational Sunday League.

H. L. Drayton, K.C., and *R. G. Code*, K.C., for the Attorney-General for Ontario.

W. D. Lighthall, K.C., for the Department of Labour.

The facts of the case are fully set out in the judgment of the Chief Commissioner.

October 17, 1908. CHIEF COMMISSIONER:—This application

is made by the Grand Trunk Railway Company under sub-section (x) of section 12 of the Act respecting the Lord's Day.

Section 12 provides that notwithstanding the other provisions of the Act, any person may on the Lord's Day do any work of necessity or mercy. Then in following clauses a variety of matters are declared to be included in the expression "work of necessity or mercy."

Sub-section (h) is as follows: "The continuance to their destination of trains and vessels in transit when the Lord's Day begins."

(k) "Work before six o'clock in the forenoon and after eight in the afternoon of yard crews in handling cars in railway yards."

(l) * * * "loading or unloading before 7 o'clock in the morning or after 8 o'clock in the afternoon any grain, coal, or ore carrying vessel, after the 15th September."

(x) "Any work which the Board of Railway Commissioners for Canada, having regard to the object of this Act, and with the object of preventing undue delay deems necessary to permit in connection with the freight traffic of any railway."

What the railway company asks is as follows:—

"The Grand Trunk Railway Company of Canada hereby applies to the Board for an order under sub-section (x) of section 3 of the Lord's Day Act, 6 Edward VII. ch. 27, as follows:

"1. Permitting the said company, by its servants, workmen, and agents, in order to prevent undue delay to traffic, to do on any Sunday, in the Province of Ontario, work incidental to the continuance to their destination of cars in transit at the beginning of each Sunday, notwithstanding that the said cars forming part of any train so in transit may not have a common destination, but may require to be switched, shunted, or otherwise dealt with for the purpose of being sent on to their several destinations.

"2. Permitting the said company to do, in the Province of Ontario, such work upon any Sunday as may be necessary for

the purpose of furnishing to shippers of livestock, a continuous railway service without which such persons would be unduly hampered and delayed in their said business.

“3. Permitting the said company to do, in the Province of Ontario, such work upon any Sunday as may be necessary for the purpose of furnishing to and from lake ports, a continuous railway service for carrying grain from elevators and vessels, and without which service such traffic would be unduly delayed.

“4. Permitting, in the Province of Ontario, the unloading of grain from vessels at lake ports, and the loading of grain into cars at such ports, and without which service such traffic would be unduly delayed.”

This whole subject received most careful consideration by Parliament, and the Act, as it stands, is the result of compromises made by those holding divergent views upon the subject matter of the legislation, and any encroachment upon its prohibitions can be permitted only for the gravest and plainest reasons.

The Board's jurisdiction arises only in connection with the movement of *freight* traffic; and as to that it is limited to such classes of work as it deems necessary to permit with the object of preventing “undue delay”; and in exercising jurisdiction, the Board is bound to have regard to the object of the Act. Of course the object of the Act is well known, and with its general intention of providing for a day of rest in every week all must be in entire sympathy; and in dealing with the application, this must be kept steadily in view.

Parliament dealt very exhaustively with this vexed subject, and the statute was the result of much discussion and contention; a very large section of the community looks with a jealous eye upon the Act, and will regard with much concern any order that may be made enlarging its provisions and extending exceptions to its prohibitions. However, in the view I take, the railway companies cannot, under the Act, or any order this Board may make, be left in any way masters of the situation, and may

be called upon to justify any movement of freight that the order, I think them entitled to, may cover. In other words, the burden will be upon them to satisfy the Court that the particular movement was necessary to prevent "undue delay," which in each individual case must be a question for the tribunal before which a prosecution may be launched. So, although Parliament has conferred certain powers upon this Board, the result of the section is, I think, that those who interest themselves in the enforcement of the Act may call the companies to account for anything done by them as a result of this application, and so control may be retained and no abuse made of privileges granted by the Board, even if such should be attempted.

Perhaps the most serious feature of this application is that referring to the grain trade. The development of this traffic has likewise received the most careful attention in Parliament, and millions of public and private money have been invested in its development—in the deepening and improvement of harbours, the enlargement of ships, the construction of canals, elevators and lighthouses, the enlargement and extension of railway terminals, eliminating curves and lowering gradients—much of which has been compulsory by reason of the keen competition of the American carriers. Along the American lines, there are no Lord's Day laws to interfere with or temporarily check the flow. A continual struggle for this carrying trade exists between the routes through Ontario and those through American channels. There may be some extremists who would prefer that this trade through Ontario gateways should be crippled rather than permit it to continue upon the Lord's Day; but I am mistaken in my estimate of the Christian people of the Province if there is not a very large majority that would make reasonable concessions to avoid undue interference with this traffic, were they satisfied of the existence of the facts that made such course reasonable.

Now, under the Act as it stands, trains and vessels in transit

when the Lord's Day begins, carrying grain, may continue to their destination; and after September 15th in each year grain vessels may be loaded or unloaded before 7 a.m. or after 8 p.m. upon the Lord's Day; but it is said that this carrying trade cannot be retained for Canadian carriers if these limitations are to be strictly observed.

Turning now to the evidence given upon the hearing, Mr. Tiffin, Superintendent of the Northern Division of the Grand Trunk Railway, has under his control the ports of Midland, Collingwood, and Meaford; he says that in order to take care of the grain and by prompt movement protect the Canadian route, it is absolutely necessary to move the empty cars upon the Lord's Day, to release the vessels; that these latter must be loaded promptly, that they may return for other loads, and that if this is not done the vessel owners will carry to American ports where they obtain a continuous service; that this would mean to the vessel owner a trip or two more in the season than to Canadian ports. The time of arrival of these vessels cannot be fixed, owing to weather and other conditions, and that he has seen on Sundays two vessels at Meaford, four at Collingwood, and six or eight at Midland, all waiting to be unloaded. This grain all passes through the elevators, and only one vessel can unload at a time at each elevator. The cars for this grain have to come to the ports empty; and when the elevator is full, the empties are required to receive the grain through the elevator from the ship, or unloading must stop. This grain comes from Port Arthur, Duluth, Chicago and Fort William, and Mr. Tiffin says that at times they have been unable to handle this traffic even by working seven days a week; and that to prevent undue delay, after September 15th and for two months after the opening of navigation in the spring, it is necessary to haul the empty cars in train load lots through to the lake ports on the Lord's Day, load from the elevator, and start them on to their destination.

Mr. Donaldson, Superintendent in charge of Depot Harbour,

states that in years of good crops the railway has more grain to handle through that port than can be cared for by working seven days a week; that there are "tramp" vessels bringing grain to Depot Harbour that would go to American ports, if they were impeded in unloading; their arrival cannot be timed, owing to fog, congested condition in the Sault Canal, and stormy weather; and that 14,000,000 bushels have been handled through Depot Harbour in one season. This is booked from Chicago, Milwaukee, Duluth, Fort William, and Port Arthur, for sailings from Montreal by various steamships, in which space has been taken; and during the rush season it is absolutely necessary, in order to handle this traffic and preserve it over that route, to make movements upon the Lord's Day that are prohibited by the Act. A large amount of package freight from the New England States, New York, and Boston, also from Chicago and Milwaukee, passes through Depot Harbour. This is on the upper deck of the vessels and the grain below. The package freight has to be removed before the grain can be got at, and all this increases the difficulty connected with the unloading of grain vessels at the week end.

Mr. Donaldson says the competitive routes with his are those that run to Galveston, rail and ocean to Europe, and the lake ports to Buffalo and Toledo and other elevator points; the grain going via Buffalo continues whether Sunday intervenes or not; if that coming via the Canadian ports is held up for a day, a very serious handicap is put upon the Canadian carrier as against his American competitor.

Mr. W. G. Brownlee, Manager of Transportation of the Grand Trunk Railway says that if they are prevented from taking empty cars to the lake ports on Sunday this season, his road will lose the carrying of 5,000,000 bushels of grain. While the mere money loss to a corporation not allowed to work its employees on the Sabbath may be of no moment, it seems to me the pecuniary loss to the Grand Trunk by not being able to carry this grain is not the only thing for consideration. If it were, I

should regard the evidence as of little value. If this grain cannot be carried by Canadian lines it will go through American channels, and others will benefit at the expense of the country whose every effort has been put forth to acquire and hold this carrying trade; and so, instead of merely the Grand Trunk interests being involved, it is the larger question of the commerce of the country being at stake, and while I am not at all of the opinion that this is a reason for making a week-day of the Sabbath, I do think that some modification of the Act may be made so that this traffic may be retained, and yet that the minimum of Sunday work be permitted. The railways carrying grain from Georgian Bay ports are in competition not only with the American railways but also experience the keenest competition from the all-water routes, not only in the movement of east-bound grain but in the westbound traffic. Depression in lake traffic has diverted many vessels from the upper lake carrying trade to the longer routes to St. Lawrence points or through to Montreal. The movement of this year's crop will tax to the utmost the capacity of the rail carriers from Georgian Bay points, and to place themselves in a position to compete with some degree of success with other routes, and obtain a share of this carrying trade, special tariffs were filed by them with the Board, becoming effective September 4th, reducing the wheat rate to 5 cents per bushel from Georgian Bay points to Montreal. It is manifest from the conditions above indicated and others that exist, that some degree of freedom, consistent with reason, should be extended to the rail carrier from Georgian Bay points; others beside those who stand for strict Sabbath observance in Ontario are concerned in this matter. Freight rates to ocean ports are of vital interest to the Western farmer, and any barrier along the route reflects upon the price obtainable by him for his wheat.

Again, Ontario is a mere link in the route to the seaboard, and under the Act, as it stands, vessels and trains in transit through Ontario, when the Lord's Day begins, may continue to

their destination. Grain vessels may continue loading or unloading up to seven o'clock in the morning, and may again resume after eight o'clock in the evening, after September 15th, upon the Lord's Day. It is sworn and not contradicted that the grain carrying trade cannot be carried on if stopped between 7 a.m. and 8 p.m. (except where vessels and trains are in transit). It does not seem reasonable, in view of the vast interests involved both to the carrier and to the whole country, that this traffic should be destroyed by undue delay.

The railway company asks permission to furnish to shippers of livestock a continuous service, without which such persons would be unduly hampered in their business; but upon this branch no evidence was given by any livestock shippers, and the facts given upon the hearing do not justify the Board in interfering with existing conditions.

The next request is that in order to prevent undue delay to traffic certain shunting be permitted on the Lord's Day. Sub-section (h) of section 12 gives leave to continue to their destination "trains and vessels in transit when the Lord's Day begins, and work incidental thereto." The interpretation clause of the Act does not define the word "train." Sub-section 32 of section 2 of the Railway Act defines "train" as including any engine, locomotive, or other rolling stock.

The applicants allege that great delay and loss will ensue if they are prohibited from continuing to their destination individual cars that may be in transit when the Lord's Day begins, and perform the work incidental thereto. Let a concrete case serve as an illustration: twenty cars of cattle leave Palmerston on Saturday evening, fifteen for Montreal for export by steamer sailing on Monday, five cars for Toronto, where the train arrives at, say, three o'clock on Sunday morning. What was the destination of this "train"? It is contended the railway employees cannot leave the five cars for Toronto when the train arrives there and carry the other fifteen to Montreal, but must either hold the whole train at that point or take the five Toronto

cars on to Montreal. To leave the five cars, means breaking up the train, and this, it is said, cannot be done. It may be said that the Toronto cars should not have been attached to the train and so the difficulty was caused by those responsible for making up the train. Perhaps had another freight train been leaving Palmerston for Toronto to which the five Toronto cattle cars might have been attached, "undue delay" in getting those cars to Toronto might have been avoided by not mixing the Toronto and Montreal cars; but suppose the Toronto cattle had to be there for Monday morning and no other train that could carry them was leaving Palmerston on Saturday night, it is manifest these cattle must be taken by special train, making a prohibitive freight rate, or not reach Toronto for Monday morning.

I do not think any harm will follow or any encroachment be made upon the spirit or object of the Lord's Day Act by giving the company liberty to leave the five Toronto cars at their destination and continue to Montreal with the other fifteen cars. Suppose this case actually occurred and the company was prosecuted, it would still have to establish that the whole movement was necessary in order to avoid "undue delay," not only dropping the Toronto cars at that point but the making up of the train in this manner at the starting point.

Illustrations might be multiplied, many of which would shew how this privilege might be abused by the railways in bringing to, say, Mimico upon various trains from different points, cars destined to Montreal, and there sorting out the latter and making up an entirely new train. If this is attempted, the Courts must say whether it was necessary to prevent "undue delay," and so I think full control is retained and prosecutions will be effective in preventing abuse of privileges granted by this Board, and care exercised by those responsible for the operation of railways will prevent the public sense from being offended by unnecessary movement of freight trains on the Lord's Day.

I therefore think that an order may issue permitting the

Grand Trunk Railway Company, its servants, workmen, agents, or officers, in order to prevent undue delay, to

(1) Unload grain from vessels at lake ports in Ontario and load grain into cars at such ports between September 15th in any year and June 1st in the year following, upon the Lord's Day.

(2) Between the said dates do such work as may be necessary for the purpose of furnishing to and from such Lake Ports in Ontario a continuous railway service for carrying grain from elevators and vessels upon the Lord's Day.

(3) Perform all work necessary upon the Lord's Day for the delivery to their several destinations of freight cars that were in transit when the Lord's Day began.

If it is found that attempts are made to abuse the provisions of this order, the Board will cancel it in whole or in part.

Other railways carrying grain from Ontario lake ports are, of course, entitled to the like privileges.

It may not be uninteresting to note that in a report made to the Board on the 9th of June, 1908, by one of its officials in dealing with the question as to whether the Grand Trunk Railway Company had, during the previous year furnished adequate and suitable accommodation for the carrying, unloading and delivery of traffic offered for carriage upon its lines, the following paragraph appears:—

“The effect upon the power of the company to receive, carry and deliver traffic without delay, in compliance with the provisions of the Lord's Day Act, will, in my opinion, mean a loss of 21 per cent. per week, or, in other words, the company would move only 79 per cent. of its capacity during the week.”

UNDUE PREFERENCE.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.]

CROW'S NEST PASS COAL CO. v. CANADIAN PACIFIC RY. CO.

(Case No. 3880.)

Agreement—Reduced rates—Adequate consideration—Unjust discrimination—Similar circumstances and conditions—Undue or unreasonable preference or advantage—Jurisdiction of the Board—Railway Act, secs. 315 and 317.

By an agreement made in 1897 between the applicant coal company and the respondent railway company, the latter agreed for valuable consideration amongst other things to charge the former at the rate of not more than six tenths of its ordinary tariff rates on all "plant" shipped by the coal company over the lines of the railway company. The railway company ceased to comply with the provision of the agreement as to rates on 1st May, 1907, on the ground of illegality.

The coal company applied for an order to compel the railway company to file a tariff of such reduced rates and for a refund of all excesses charged to the applicant.

Held, 1. That it was impossible to find that the consideration paid to the railway company was "adequate" for the favoured treatment.

2. That other persons and corporations under similar circumstances and conditions in the same district would be unjustly discriminated against by a continuance of the reduced rates and that the agreement in that respect constituted an undue or unreasonable preference or advantage contrary to sections 315 and 317 of the Railway Act.

Assuming that the Board had jurisdiction to make the order asked as to which there is grave doubt, the application must be refused. Reference to *Brant Milling Co. v. Grand Trunk Ry. Co.*, 4 Can. Ry. Cas. 259.

The application was heard at Ottawa on the 19th of November, 1908.

F. H. Chrysler, K.C., *A. H. Marsh*, K.C., and *G. G. S. Lindsay*, K.C., for the applicant coal company.

The agreement was made for a very large consideration, but the railway company now say that it is contrary to the Railway Acts of 1888, 1903 and the present Act of 1906.

Sections 315 and 317 of the present Act contain nothing which would make the agreement illegal. Under the conditions existing when the contract was made there could be no discrimination because there was no one else carrying on business

in that country. There was nothing intended to be secret in the agreement contrary to section 233 of the Railway Act of 1888. It was a special contract. The difficulty has arisen because the rate mentioned in the contract is put in the form of a proportion and not as a fixed rate. If the provision had been that the coal company should pay on "plant" not more than 60 cents per 100 lbs. it would have been perfectly good.

If the rate became illegal after the change in the Act of 1903 requiring a tariff to be filed then we are content to take 60 per cent. of the ordinary rate at that time, and a tariff may be filed for that rate.

The agreement as to reduced rates was legal and binding under the clauses of the Railway Act of 1888 providing for maximum tariffs, which are taken from the English Act of 1854, 17 and 18 Vict. ch. 31, see *Denaby Main Colliery Co. v. Manchester, Sheffield & Lincolnshire Ry. Co.*, 14 Q.B.D. 209.

If the shipper gives adequate consideration for the concession in the tariff then it is not a case of unjust or unreasonable preference under section 317(a) : *I. C. C. v. Texas & Pacific Ry. Co.*, 52 Fed. Rep. 187, p. 189; *Nicholson v. Great Western Ry. Co.*, 5 C.B.N.S. 366; *Strick v. Swansea Canal Co.*, 16 C.B.N.S. 245.

Section 317 (3) (a) is taken from section 2 of the English Act of 1854 supra, and is fully dealt with in *Phipps v. London & North Western Ry. Co.* (1892), 2 Q.B. 229. At page 236 Lord Herschell says that the section implies that there may be a preference but does not make every inequality of charge an undue preference. Whether a preference is undue or unreasonable is a question of fact: *Root v. Long Island Ry. Co.*, 114 N.Y. 300; *I. C. C. v. Alabama Midland Ry. Co.*, 168 U.S.R. 145; *Lough v. Outerbridge*, 143 N.Y. 279; *I. C. C. v. Baltimore & Ohio Ry. Co.*, 43 Fed. Rep. 44 and 46.

A. R. Creelman, K.C., and *E. W. Beatty*, for the respondent railway company.

It cannot be said that the agreement was given for adequate

consideration. This application cannot be granted without contravening the provisions of the Railway Act. The company attempted to carry out the agreement in good faith after it was made. The Board has no jurisdiction to order the railway company to file a tariff for reduced rates.

Chrysler, K.C. We are asking for a decision of the Board under section 318 as to the legality of the contract, and if the contract is legal then a tariff might be filed which is not a breach of the Act.

Creelman, K.C. If the application is granted and we only exact six-tenths from the coal company and ten-tenths from all others these other parties aggrieved could ask relief from the Board.

The cases cited by Mr. Marsh are not authorities on the construction of the Canadian Railway Act. The contract is forbidden by sections 315 and 317 and section 341 clinches the matter, against the applicant.

At the time the contract was made the coal company was the only company operating in that locality. Since then eleven other coal and coke companies operate in Alberta, Saskatchewan and Southern British Columbia. Some of these are on the Crow's Nest Branch of the railway, and all of them would be affected by this contract, and none of them were in existence when this contract was made. Reference was made to *Re Atchison, Topeka & Santa Fe Ry. Co.*, 10 I.C.C. Rep. 473, p. 474; *Manchester, Sheffield & Lincolnshire Ry. Co. v. Denaby Main Colliery Co.* (1886), 4 Ry & C. Tr. Cas. 438; *Red Cloud Mining Co. v. Southern Pacific Ry. Co.*, 9 I.C.C. Rep. 216; *Bullard v. Northern Pacific Ry. Co.*, 10 Mont. Rep. 168.

Sections 321 and 401 were referred to on the question of jurisdiction. The effect of the application is tantamount to asking for a rebate indirectly. The circumstances of the *Bullard* case, already cited, are very similar to this case.

The facts of the case are fully set out in the judgment of the Chief Commissioner.

November 23, 1908. **THE CHIEF COMMISSIONER:**—The applicant asks for an order that the railway company do file a tariff from all points in Canada to all points on the property of the applicant company, viz., Michael, Fernie, Coal Creek, Morrissey Junction and Carbonado, and hereafter to all other points at which collieries may be established by the applicant company for all "plant," as defined by an agreement of February 19th, 1906, which the applicant company may ship over the lines of the respondent, required by the applicant for the construction and operation of their works, such tariff to be not more than six-tenths of the present tariff rates on such materials for carload or less than carload, and to refund to the applicant company all excesses which the respondent has charged the applicant on such plant since May 1st, 1907, and generally to file tariffs in compliance with the provisions of paragraph 14 of an agreement of July 30th, 1897.

On the last mentioned date a lengthy and somewhat complicated agreement was entered into, to which the British Columbia Southern Ry. Co., the respondent, and the Kootenay Coal Co. were parties, the applicant company being formerly the Kootenay Coal Co. and admittedly entitled to the benefits of the agreement.

Paragraph 14, under which relief is sought, is as follows:—

"The construction materials required by the coal company to be used in the construction of permanent works, and for timber used in its said mines, and carried by the Pacific Company to the coal company's said mines from points on the line of the Pacific company's said railway, the coal company will be charged by the Pacific company for the carriage of all such materials no more than the rate of one cent per ton of 2,000 pounds per mile, such construction material to include rails, fastenings, ties, bridge timber, and lumber required by the coal company, pro-

vided that such material may be carried a distance of not less than one hundred miles on the Pacific company's railway, and that for all plant shipped by the coal company over the lines of the Pacific company, and required by the coal company for the *construction and operation* of the said works, the coal company shall be charged by the Pacific company at the rate of not more than six-tenths of the ordinary tariff rates on such materials for carload or for less than carload."

When this agreement was entered into the works of the coal company had not been established, and the respondent had no line of railway in the locality where it was the intention of the coal company to locate what has since become an industry of very large proportions and in which upwards of \$5,000,000 have been invested.

Nothing turns upon the portion of the above paragraph concerning the carriage of materials at one cent per ton per mile, and it was stated that the regular tariff rate of respondent upon such materials was less than the amount agreed upon, and the applicant was charged upon such material at the tariff rate.

On Feby. 19th, 1906, an agreement was entered into by the parties to this contest under which the following articles were considered as "plant" under the above clause 14:—

Asbestos.

Babbitt metal.

Brattice cloth.

Bridge on Tipple material and machinery, including conveyors, link belt or other transmission machinery, screens, picking tables, dumps, ear hauls and parts thereof.

Castings, iron, steel, or brass:

Chain iron or steel.

Electrical machinery and parts, including generators, dynamos, motors, lamps, globes, sockets, wire, insulators and transformers.

Engines, stationary, including boilers, condensers, com-

pressors, box car loaders, air receivers, hoists and parts thereof.

Fire engines and apparatus.

Harness and saddlery.

Horses.

Hose, water and steam.

Iron bolts, nuts, rivets, and washers.

Iron, bar and other iron and steel.

Locomotives, steam, air or electric (used in and about the mines).

Machinery and parts thereof, including blocks, pulleys, shafting, coal and rock drills.

Mine cars and parts including trucks, irons and wheels.

Machine shop material.

Machine shop machinery and parts thereof.

Machinery packing.

Mules.

Nails and spikes used in mine structures.

Pipe, lead, vitrified, soil, wood, including fittings, injectors, lubricators and valves.

Pumps and parts thereof.

Rails, fastenings, and switch material used in and about the mines, not over 45 lbs. weight per yard.

Rope, all kinds.

Safety lamps and parts.

Scales and parts.

Tools, including files, saws, coke forks, wheelbarrows, axes, shovels, spades, picks, handles, lanterns, globes, grindstones, wrenches, anvils, bellows, dirt scrapers, machinists' and machine shop tools.

Wire, plain.

Vehicles and parts, including waggon and sleighs.

The agreement of July 30th, 1897, was entered into in good faith, and has been carried out by the parties, except as to the matter which gives rise to this application. Many covenants were

entered into by the parties to that agreement, and one result of it was that the respondent company obtained the conveyance of a very large area of coal lands, estimated by a witness at the hearing as being worth many millions of dollars, but in the view I take of this application it is neither needful nor desirable that close or accurate attention be paid to the consideration received by the respondent company for entering into the covenants embraced in this agreement, one of which was the one in contest.

The respondent agreed to construct a line of railway; this was done. The applicant agreed that this large area of coal lands should become vested in the railway company, and this covenant was fulfilled. All other covenants contained in the agreement were carried out, except that the railway company says that the provisions of the Railway Act prevent its carrying over its lines plant shipped by the applicant company for the construction and operation of its works at six-tenths of its ordinary tariff rates, and that such an agreement was and is illegal.

It was stated that when the agreement was originally entered into there was no demand in that locality for the class of articles the railway company was agreeing to carry at reduced rates; that there were no industries in existence, and, therefore, no persons against whom the six-tenths clause of the agreement would be a discrimination, and that, therefore, the agreement was valid when entered into. Be this as it may, it, I think, is not necessary to decide whether the agreement was opposed to the Railway Act of 1888, and the only point for decision here is whether the application can succeed in view of the provisions of the Railway Act now in force; and I am of the opinion that the fairer position to leave the parties in is to deal with the situation upon the footing of the present legislation, leaving the applicant to take such other proceedings as it may be advised with respect to the consideration alleged to have been given for the covenant of the railway company for this reduced freight rate, if such course is open to it.

Admitting the jurisdiction of this Board to make an order of the kind asked for, as to which I have grave doubt, although

jurisdiction was not disputed by the railway company, I do not think the application can succeed.

It is admitted that at the present time large development has taken place in the portion of British Columbia to which this agreement applies, and there are many persons, firms, and corporations requiring carriage by the railway company of the class of articles and material as defined by the agreement of Feby. 19th, 1906, into that district, and into the towns mentioned in the prayer of the petition, there are other coal companies within varying distances, some within one hundred miles of the applicant's coal area and plants, requiring similar articles and material, and the success of this application would mean that the applicant would pay but six-tenths of the regular tolls charged to others upon all the various materials mentioned in the agreement of Feby. 19th, 1906, and this for all time to come, so that in future years if the railway company reduced its rates upon these articles, or any of them, or were so required by the Board, the tolls to be paid by the applicants would continue to be but six-tenths of such reduced rates, and so discrimination in its favour would continue for all time. I think such a condition is opposed to the spirit as well as the express provisions of the Railway Act.

Mr. Marsh argued with much force that all this was quite permissible, as the applicant had paid an adequate consideration for the favoured treatment, and he cited some English and American cases that go to support that contention. I have gone through most of these, and while some can be distinguished, both as to the facts and the terms of the various statutes upon which they were decided, it is sufficient to say that the same are not binding upon this Board, and no such principle has as yet been introduced into the railway jurisprudence of Canada, and it has been dissented from in other cases both in England and the United States. It is impossible to find as a fact that the consideration passing from the coal company to the railway company was "adequate." It is contended this consideration requires the railway company to carry at these reduced tolls for all

time. Who can say what the actual sum was that was paid? The area of coal lands so conveyed are undeveloped, and their value is based upon opinion evidence only. Who can say how much material is to be carried by the railway company for the coal company, and what is the length of time that such carriage is to continue? Who can say to what extent the tolls upon these articles may be reduced in future years by reason of competition or otherwise? All these are matters upon which reasonably accurate information must be had before it could be said that the coal company had paid to the railway company a consideration that could fairly be said to make up the other four-tenths of the tolls, thereby eliminating the discriminatory feature of the agreement.

In this case no finding could be made that the consideration was "adequate"; but if the contrary was the case, I would not follow the cases cited for the proposition that under our law any such agreement can be made.

The Railway Act requires that under substantially similar conditions the tolls charged shall be equal to all persons, and at the same rate, whether by weight, mileage, or otherwise, and any reduction or advance either directly or indirectly is expressly prohibited. No undue or unreasonable preference or advantage can be permitted to any person or company. The object of the legislation is to place every one upon terms of absolute equality, and if agreements were permitted to be entered into for reduction in tolls or for other preferential treatment, the door would be opened wide for the defeat of the Act, and the Board would be called upon to struggle with all sorts of conditions, opinions, and complications in the determination of such cases.

It will not be understood that I am expressing the opinion that such was the object of the present agreement, the conditions existing when the same was entered into were such that the contrary opinion might be arrived at.

I think the application must be refused.

COMMUTATION—UNJUST DISCRIMINATION.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.

WEGANAST V. GRAND TRUNK RY. CO.

*(Brampton Commutation Rate Case, No. 3378.)**Commutation passenger tickets—Unjust discrimination—Undue preference—Railway Act, secs. 77, 341.*

Upon an application to the Board for an order directing the Grand Trunk Ry. Co. to issue commutation tickets as well between Toronto and Brampton as between the same point and Oakville, Brampton being within 4/100 of a mile of the distance from Toronto to Oakville, but on a different line; it was contended that the passenger fares between the said points constituted an unjust discrimination or undue preference in favour of Oakville and against Brampton, and that the onus lay on the railway company by section 77 to shew that it did not exist.

Held, 1. That under section 341 the railway company was within its rights in issuing such reduced fare tickets between Toronto and Oakville.

2. That the application must be refused, Oakville not having profited at the expense of Brampton.

3. A railway company has the right under the Railway Act to discriminate between points and is only required to prove itself free from unjust discrimination or undue preference.

THE application was heard at Toronto on the 12th and 13th of November, 1908.

F. W. Weganast, applicant, in person.

W. H. McFadden, K.C., for the Town Council of Brampton.

R. H. Pringle, for the Board of Trade of Brampton.

J. S. Fullerton, K.C., for the City of Toronto in support of the application.

M. K. Cowan, K.C., for the Grand Trunk Ry. Co.

It appeared from the evidence that the ordinary train service between the cities of Toronto and Hamilton on account of the frequency and hours of the service made it possible for persons living at Oakville to travel daily to and from their business in Toronto. The ordinary train service between Brampton and Toronto, however, originating a long distance from Toronto left Brampton for Toronto either too early or too late and *vice versa* to be of any value for persons desiring to live in Brampton and

attend to their business in Toronto, although a few persons might do so.

The general agent for the Grand Trunk Ry. Co., Mr. G. T. Bell, gave evidence that the number of persons would likely be so limited as to render transportation at commutation rates unprofitable, as has been found in the State of Massachusetts, the most favourably situated in North America for the development of suburban business. One of the railways that had made commutation rates between Boston and the adjoining stations and operated between sixty and seventy suburban trains a day, found that such train service was an actual loss, by reason of the competition of the electric railways on the highways in the vicinity.

The other facts of the case are fully stated in the judgment of the Chief Commissioner.

November 23, 1908. THE CHIEF COMMISSIONER:—The applicant alleges that he is a resident of the town of Brampton, is a law student attending lectures at Osgoode Hall, Toronto, and travels daily, except Saturdays and Sundays, between Brampton and Toronto, the return fare between which places is \$1.10, Brampton being 21.1 miles distant. That between Toronto and Oakville, 21.14 miles from the former city, the railway company issues commutation tickets consisting of 55 coupons good for one trip each way at 13 cents per trip, and also a ticket consisting of ten coupons for \$3.25, or 32.5 cents per trip. The applicant claims that the railway company should be required to issue trip tickets good between Toronto and Brampton upon a similar basis.

The application was supported by counsel for the town and Board of Trade of Brampton, and by counsel for the city of Toronto.

The case was based entirely upon the contention that the action of the railway company was an unjust discrimination against Brampton in favour of Oakville.

Section 341 of the Railway Act provides that nothing in the Act shall be construed to prevent the company from issuing

"mileage, excursion, or commutation passenger tickets," so that the company is within its rights in issuing these reduced fare tickets between Toronto and Oakville.

Section 77 of the Act provides that whenever the company charges persons in one district lower tolls than it charges to other persons in another district "for the same or similar services," the burden of shewing that such difference in treatment does not amount to an undue preference, or an unjust discrimination, shall lie on the company.

Much evidence was given shewing the train facilities between Toronto and the towns in question, and the history of the granting of these tickets between Toronto and Oakville. It appears that many years ago reduced rates existed between Toronto and Brampton, but they were abandoned by the railway company upon the complaint of Brampton merchants, who contended that it took trade from them to the Toronto merchants. The former it was said went so far as to threaten the company that they would divert their traffic from the Grand Trunk Ry. Co. if these reduced fares were continued.

At the same time similar reduced fares existed between Oakville and Toronto, and no complaints were made by Oakville merchants against the practice. It would therefore seem that the withdrawal of these privileges from Brampton was not brought about by the railway company upon its own initiative, but was solely upon account of the situation above indicated.

It was said also that during the experimental stages of the cheap fares between Toronto and Oakville, some persons, in consequence thereof, had purchased houses there, and at the time the rates were withdrawn from Brampton they were allowed to continue between Toronto and Oakville, otherwise these persons might have to sacrifice their property.

In view of these facts, it is clear that the present situation is not brought about by the choice of the railway company; that it is not solely responsible for either the discontinuance of the Brampton rate or the continuance of the Oakville rate, and if there is unjust discrimination against Brampton and in favour

of Oakville, the people of the former place can hardly lay the blame upon the company.

Between Toronto and Oakville about twelve persons in the winter and twenty in the summer avail themselves of these reduced fare tickets. There never was any suburban service, and these passengers ride on the regular trains.

Witnesses from Brampton stated that, in their opinion, reduced fares between Toronto and Brampton would have the effect of increasing real estate values there, and persons now residing in Toronto would go there to live. I have no doubt these reduced fares would prove a great convenience to the persons now residing in Brampton, but the point for decision is whether Brampton is "unjustly discriminated" against in favour of Oakville. The Act recognizes the right of a railway to discriminate between points, it is only *unjust* discrimination, or *undue* preference that the company is required to prove itself free from. There is evidence that no one has chosen to buy property in Oakville who would have purchased in Brampton had reduced fares to that town been in effect. There is evidence that no one has removed from Brampton to Oakville consequent upon reduced fares to that town, and there is evidence that, so far as known, no one has removed from Toronto or elsewhere to Oakville who would have chosen Brampton had reduced fares existed to that town. It may be that Oakville has to a small extent profited by these reduced fares; it may be that Brampton would profit to an equal or greater degree if they were in force between Toronto and that town; but the question is whether Oakville has profited at the expense of Brampton, and I am of opinion that such has been shewn not to be the case.

Counsel for the town of Brampton asked that these tickets between Toronto and Oakville be prohibited unless the like privileges were granted to Brampton; but I am of opinion that in as much as it has been shewn that Brampton has not been injured, it would not be fair to the people of Oakville to make such an order.

The application must be refused.

JOINT TARIFFS.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.

ALGOMA CENTRAL & HUDSON BAY RY. CO. V. GRAND TRUNK
RY. CO.

(Case No. 1070.)

Joint tariffs—Public interest—Existing rate—Reasonableness or otherwise—Through rates—"Reasonable facilities"—Continuous route—Railway & Canal Traffic Act, 1888, sec. 25—Railway Act, secs. 7, 317, 333, 334, 338—Railway Act, 1903, secs. 266, 267, 276.

The Algoma Central & Hudson Bay Ry. Co. applied to the Board for an order directing the Grand Trunk Ry. Co. to make a joint tariff with them.

The steamers of the applicant railway wished to obtain a joint tariff with the Grand Trunk so as to compete for traffic from points in Ontario reached by the lines of the Grand Trunk and carry such traffic from lake ports by their steamers to ports in Northern Ontario and vice versa reached by their steamboats and railway. The Grand Trunk Ry. Co. has now a similar joint tariff arrangement with the Northern Navigation Company.

Held, 1. That the applicant has not proved that there is a public interest involved, or

2. That the existing rate arrangement is unreasonable.

THE application was heard at Toronto on the 16th of November, 1908.

H. S. Osler, K.C., appears for the Northern Navigation Company.

George Wilkie, appears for the Algoma Central & Hudson Bay Ry. Co.

M. K. Cowan, K.C., appears for the Grand Trunk Ry. Co.

November 23, 1908. MR. COMMISSIONER McLEAN:—This is an application of the Algoma Central and Hudson Bay Railway Company for an order under sections 7, 317, 333, 334 and 338 of the Railway Act for a joint tariff with the Grand Trunk Ry. Co.

In the earlier case of the *Algoma Central & Hudson Bay Ry. Co. v. The Grand Trunk Ry. Co.*, in which application was made

on behalf of the steamboats of the Algoma Central & Hudson Bay Ry. Co. to obtain a joint tariff with the Grand Trunk, the application was refused, it being held that in terms of sections 266 and 267 of the Railway Act of 1903 a line of steamships operated by a railway company running to ports reached by the line or lines of another railway did not constitute a continuous route within the meaning of sections 266 and 267 of the Railway Act of 1903.

Algoma Central & Hudson Bay Ry. Co. v. Grand Trunk Ry. Co., 5 Can. Ry. Cas. 196.

The applicant company relied upon section 276 of the Railway Act, 1903, as making the provisions of sections 266 and 267 extend to the traffic mentioned.

In the present application the legality of a continuous route composed by the use of vessel and rail is not involved since this point is now covered by the Railway Act. In respect of the present application it is to be noted that the jurisdiction conferred under sections 333 and 334 of the Railway Act in regard to through or joint rates is based on section 25 of the English Railway and Canal Traffic Act of 1888. This section is an expansion of the "reasonable facilities" clause of the Act of 1854. Under this clause the Court of Common Pleas decided so early as 1857 that in order to grant through booking, public inconvenience must be made out: *Barret v. Great Northern and Midland Ry. Cos.*, 1 Ry. & C. Tr. Cas. 38.

The principles involved in the English Act of 1888 are the same as those in the Canadian Act, although the means whereby the through rate may be obtained differ.

Section 25 of the Act of 1888 provides *inter alia* that the "facilities" shall include "the due and reasonable receiving, forwarding and delivery . . . at through rates, tolls or fares."

Sub-section 5. "If an objection be made to the granting of the rate or to the route, the Commissioners shall consider whether the granting of the rate is a due and reasonable facility in the

interest of the public, and whether . . . the route proposed is a reasonable one”

The policy of the English Railway and Canal Commission is indicated by the following citations:—

Reasonableness of the through rate and the interest of the public are the tests by which the demand must be tried.

Didcot, Newbury and Southampton Ry. Co. v. London & South Western Ry. Co. et al., 10 Ry. & C. Tr. Cas. 9, pp. 15, 17.

“It was not the intention of Parliament, nor has it been the practice of the Court to encourage applications for through rates, the only effect of which would be to transfer traffic from one route to another, or to reduce reasonable rates.”

Ib. per Lord Cobham, 25.

A through rate was refused because not a facility in the interests of the public.

Swindon, Marlborough & Andover Ry. Co. v. Great Western and London & South Western Ry. Cos., 4 Ry. & C. Tr. Cas. 349, p. 350.

“ . . . however desirable a reduced rate may be in the interests of the public, it is always necessary to see whether there is a commensurate advantage to the railway company who may be forced by the decision of the Commissioners to accept a lower scale of charge than that which it is actually making and to which it is entitled.”

Per Collins, J., in *Plymouth Chamber of Commerce v. Great Western and London & South Western Ry. Cos.*, 9 Ry. & C. Tr. Cas. 72.

“ I for one should be inclined, in a case of this sort, to take very seriously into consideration, on the question of public interest, the fact that two competitive routes must tend to make either company more likely to give reasonable concessions to traders.”

Plymouth, Devonport & South Western Junction Ry. Co. v. Great Western Ry. Co. et al., 10 Ry. & C. Tr. Cas. 68.

While the jurisdiction of the Interstate Commerce Commission of the United States differs in various respects from that of

the Canadian Board the similarity of some of the problems to be dealt with make the findings of the former body of interest. The Interstate Commerce Commission has passed on the question of joint or through rates in *Loup Creek Colliery v. Virginian and Chesapeake & Ohio Ry. Cos.*, 12 I.C.C.C. Rep. 471.

In this case, Commissioner Clements said: "Joint rates are only empowered with the manifest intent of giving effect to the general purposes of the Act to regulate commerce by securing reasonable facilities to the public and by preventing unreasonable and unjust rates, facilities and discriminations." P. 477. It has also been held that there should be considered the adequacy of the existing shipping arrangements. Relief to shipping communities not aid to carriers in obtaining strategic advantages in their contests with one another is what is to be considered.

Chicago & Milwaukee Electric Ry. Co. v. Illinois Central Ry. Co., 13 I.C.C. Rep. 20.

It is well established that the public interest and the question of the reasonableness or otherwise of the existing rate arrangements are the vital points in any application for through rates.

I am of opinion:—

- (1) That the Algoma Central has not proved that there is a public interest involved, or
- (2) That the existing rate arrangement is unreasonable.

THE CHIEF COMMISSIONER:—I agree.

November 24, 1908. MR. COMMISSIONER MILLS:—The serious thing to my mind is that, with the present local rates on the Grand Trunk (so much higher than those charged to the Northern Navigation Company) the applicant company is prohibited from carrying its own supplies and its own manufactured goods in its own boats, and it should not be overlooked that the Northern Navigation Company now finds it necessary to increase the number of its boats, in order to accommodate the traffic via the Grand Trunk.

JURISDICTION—FARM CROSSING.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.

NEW V. TORONTO, HAMILTON & BUFFALO RY. CO.

(Case No. 3493.)

Jurisdiction and discretion of the Board—Land-locked lands—Way of access to brick yard—Location of crossing—Convenience—"Farm crossing"—Land on one side of the railway—Cost of construction and maintenance—Indemnity against damages by accidents at crossing—Railway Act, secs. 252, 253.

Henry New (a brick manufacturer) applied to the Board under secs. 252 and 253 of the Railway Act for an order directing the Toronto, Hamilton and Buffalo Ry. Co. to provide and construct a suitable crossing where the railway abuts on the lands of the applicant.

By reason of the construction of the Toronto, Hamilton and Buffalo Ry. New was deprived of access to a travelled road except by passing over the lands of his sons and crossing a number of railway tracks.

The object of the application was to obtain access to the said road by a crossing over the railway for the purpose of more conveniently carrying on his manufacturing business, but not in any way for farm purposes or as a farm crossing.

Held, that the application for a crossing of the nature of a farm crossing should be granted by the Board in the exercise of its discretion, upon the condition that all expenses of construction and maintenance of the crossing must be borne by the applicant.

THE application was heard at Hamilton on the 13th day of October, 1908.

A. M. Lewis, appeared for the applicant.

E. D. Cahill, appeared for the Toronto, Hamilton & Buffalo Ry. Co.

The lands of the applicant were situated in the Township of Barton, bounded on the south by the lands of the Grand Trunk Ry. Co. and on the north by the lands of the Toronto, Hamilton & Buffalo Ry. Co. Immediately to the north of the Toronto, Hamilton & Buffalo Ry. Co.'s lands was a travelled road over the northern portion of which the Hamilton, Grimsby & Beamsville Ry. Co. had a right of way. The lands of the applicant were situated between what was known as Trolley Street on the West and by the Mountain Road on the South-east, the land coming to

a point in that direction. The applicant bought all the land between these two streets; conveying the westerly portion to one son, the easterly portion to another, retaining the centre part for the manufacture of bricks.

The applicant had no means of access to a highway except by a road constructed across the lands of his son on the east; any access to the Mountain Road being impracticable.

A. M. Lewis. This is an application for a crossing under sections 252 and 253 of the Railway Act. The term "farm crossing" has not been limited to "farm purposes." These sections should be given as liberal interpretation as possible. If they are to be limited in that way, what is the purpose of the sections? Section 253 reads "any land owner" and for the "reasonable enjoyment of his land" and applies to land on one side of the railway only.

The term "farm crossing" has not been defined in any reported case, see *Grand Trunk Ry. Co. v. Perrault*, 36 S.C.R. 671, 5 Can. Ry. Cas. 293, nor has its use been confined to "farm purposes" only. This is the first time that a restricted meaning has been sought to be given to it. Previously to the Act, a farmer could say, I will not take a crossing. You must pay me the whole value of my land.

The result is that the giving of a farm crossing is as much a relief to the railway company as to the private owner.

E. D. Cahill. It is quite clear that sections 252 and 253 of the Railway Act relate to farm land and not land used for manufacturing purposes.

The authority of the Board is limited to granting the crossing applied for by the words "farm crossing."

Guthrie v. Canadian Pacific Ry. Co., 27 A.R. 64, 31 S.C.R. 155, 1 Can. Ry. Cas. 1, 9, decided that there must be ownership on both sides of the right of way.

A. M. Lewis, in reply. The *Guthrie* case was decided before section 253 was passed, and it is not in point.

October 30, 1908. THE CHIEF COMMISSIONER:—I think,

under the circumstances of this case and the land-locked position of the applicant's lands, it is not unreasonable to allow him a crossing of the nature of a farm crossing over the lands of the railway company. The company objected that the crossing, not being intended for farm purposes, could not be ordered by the Board. I do not think the Act should be construed in such a narrow manner. So to construe it would produce great injustice and hardship in many cases. The parties did not produce the conveyances affecting the lands of the applicant or of his predecessors in title, or of the railway company's right of way at the point in question; and we are in the dark as to terms and conditions therein, if any.

There seems to be no greater danger, indeed less, in allowing the applicant to cross at or near where he desires, than to require him to obtain access to Trolley Street over the lands of his sons, if he were able so to do, and as to which there is no evidence.

I do not think it needful to refer to the cases cited by counsel, as I have come to the conclusion that the Board may as a matter of discretion grant the crossing asked for.

It may be that this crossing can be located at a point less inconvenient to the railway company than that demanded by the applicant, and the Board's engineer will inspect the premises and locate the crossing upon the ground.

All expense connected with the construction of the crossing will be borne by the applicant.

The company asks that it should be indemnified by the applicant for all damage they may be put to by reason of accidents at this proposed crossing. I do not think this reasonable, as damages might arise through the grossest kind of negligence of its employees, and it would be manifestly unfair that such should be visited upon the applicant. When the engineer inspects the premises, he may make inquiries as to the hours that the line of railway is mostly used, and if he finds it possible to limit the hours that the applicant may use the crossing, in order that possibility of accidents may be minimized, he may

report to the Board his conclusions, and before the order issues, these (if any) will receive due consideration. The engineer will also report as to such protection, if any, as he deems necessary.

NOTE.

In *Plester v. Grand Trunk Ry. Co.*, 1 Can. Ry. Cas. 27, decided under the Act of 1888, the hauling of gravel over a farm crossing was held, under the circumstances, a farm purpose. The English Courts have taken a different view of the corresponding sections of the Railway Clauses Consolidation Act, 1845, 8 Vict. ch. 20. See cases cited at p. 31 *supra*.

COMPENSATION—DAMAGE TO REMAINING LAND.

ONTARIO.]

[CLUTE, J.

CANADIAN PACIFIC R.W. CO. v. GORDON.

(Unreported.)

Arbitration—Award set aside—Land taken for railway purposes—Compensation—Damage to remaining land—Railway Act, sec. 155.

A railway company under its compulsory powers of expropriation acquired from the owner a certain portion of his land for the purposes of their undertaking. A majority of arbitrators by their award allowed compensation for depreciation to the remainder of his land resulting from the operation of the railway elsewhere than on the land so taken.

Held, upon appeal,

1. That the award must be set aside and the question referred back to the arbitrators for further consideration and award.
2. That the plaintiff is entitled to compensation for the depreciation of the value of his other lands, in so far as such depreciation is due to the anticipated legal use of works to be constructed upon the lands which have been taken from him under the Railway Act.
3. That the arbitrators may take into consideration the fact that the lands sought adjoin the railway premises and are convenient for extension of their yard.

March 31, 1908. CLUTE, J.:—Appeal of the railway company from the award of two arbitrators (the other arbitrator refusing to sign) allowing \$700 for land in the town of Ren-

frew taken by the Canadian Pacific Railway Company for their railway.

W. R. White, K.C., for the appellants.

F. R. Latchford, K.C., for the claimant.

The land sought to be taken is a small triangular piece (28-100 acres) required with other lands for freight shed and storage cars. It forms the rear portion of the premises of the respondent, whereon is erected a dwelling house. It has a special value to the Canadian Pacific Railway Company owing to its position, to enable the railway to reach the yard and freight shed. There are at present five tracks running into this new freight yard. Two of these tracks do not touch the land taken. One track crosses the land in question and one rail of the next track crosses it, and is there provided with a switch, from which run two lines into the yard. There is also still room for two more tracks to pass over the land so taken. That is, cars may pass over said lands and connect with five tracks and freight shed, if in the future the company so please.

Looking at the plan and having regard to the objects for which the land is taken, the use of land for five tracks seems probable, and so could be properly taken into account in assessing the damages. See *The Queen v. Essex*, 17 Q.B.D. 447, p. 455. The company's engineer gave evidence to the effect that the track on the Gordon expropriated land would not have engines upon it. I do not think that this evidence can be taken as conclusive, even if admissible, which I much doubt. Having taken the land, the company may use it legally in any way they please for the purpose for which it was taken, and Gordon could not be heard to complain.

Compensation was claimed before the arbitrators, not only for the land taken but also for damages to the remainder of his land from depreciation thereof by reason of cinders, smoke, vibration and noise from engine and cars used in connection therewith, "even if no engine is used on the one track on the

expropriated lands." The arbitrators say that "sec. 155 of the Railway Act seems to justify the claim of Gordon for damages by reason of the construction and operation of the railway." On the argument Mr. Latchford endeavoured to support this claim, relying on *Re Birely v. Toronto, Hamilton & Buffalo R.W. Co.*, 28 O.R. 468, 25 A.R. 88; and the *Duke of Buccleuch v. Metropolitan Board of Works*, L.R. 5, H.L. 418. Mr. White relied on *Powell v. Toronto, Hamilton & Buffalo R.W. Co.*, 25 A.R. 208; *Attorney-General & Hare v. Metropolitan R.W. Co.* (1894), 1 K.B. 384; *Hammersmith v. Brand*, L.R. 4, H.L. 171.

I am unable to reconcile the judgment in the *Birely Case* with the *Powell Case*. Armour, C.J., there held that damages were recoverable where no lands had been taken, not only for alterations in the grades of streets, but also for damages arising in respect of the operation of the railway.

The *Birely Case* was relied on in *Powell v. Toronto, Hamilton & Buffalo R.W. Co.*, 25 A.R. 208, and Osler, J.A., makes this observation in reference to it: "I do not dwell upon the decision in the case of *Re Birely* and *Toronto, Hamilton & Buffalo R.W. Co.* (1897), 28 O.R. 468, because, although damages appear to have been awarded there in respect of the operation of the railway, the nature of such damages is not disclosed by the report." In the *Powell Case* the corresponding sections of the Act of 1888 were considered. Sec. 92 (now 155) was then relied on. It was there pointed out that, that section must be read in connection with the group of clauses for the taking of lands and compensation therefor by the railway company, and a reference to these clauses shews that the damages sustained for which compensation is to be made is damage to lands, either from taking material or on account of its being injuriously affected by the exercise of any of the powers granted to the railway company, and that the compensation recoverable in respect of lands injuriously affected must be based on injury or damage to the land itself, and not inconvenience or discomfort to the owner or occupier.

In the *Hammersmith Case*, L.R. 4, H.L. 171, it was held that a person whose lands had not been taken could not recover from the railway company in respect of damages or annoyance arising from vibration occasioned by the passing of trains, even though the value of the property had been actually depreciated thereby.

In the *Duke of Buccleuch's Case*, L.R. 5, H.L. 418, the head note reads: "That compensation may not be granted to a person annoyed by the smoke and vibration occasioned by trains passing along a railway, constructed under the authority of an Act of Parliament, where no part of his land has been taken; compensation may be given for deterioration in the value of his property occasioned in a similar manner, where a part of his land has been taken for the construction of a work authorized by an Act.

Horton v. Colwyn Bay and Colwyn Urban District Council (1908), 1 K.B. 327, was decided under the Public Health Act, 1875, ch. 55, sec. 308. In that case the respondents, acting under the powers of the Public Health Act, (assumed for the purpose of decision to be the same as under the Lands Clauses Act), constructed an intercepting sewer, pumping station and sewerage reservoir and an outfall sewer, which were integral parts of and together formed, one scheme of sewerage. The sewers to and from the pumping station passed through the claimant's property; the pumping station and the reservoir were constructed on the lands of other persons. The value of a certain portion of claimant's lands, which were in proximity to the pumping station and reservoir, was depreciated by the contemplated user of that station and reservoir for sewerage purposes. Held, that as the acts of user, the contemplation of which caused the depreciation, would be done on land not the property of the claimant, the damage was not sustained "by reason of the exercise of the powers" of the Act, and consequently that claimant was not entitled to any compensation under that Act in respect of that depreciation.

Lord Alverstone, C.J., points out in this case, p. 334, that

for many years it was thought that it made no difference whether any land had been taken or not, as to the extent of a claim for compensation for injuriously affecting. The *In re Stockport, Timperly & Altringham R.W. Co.*, 33 L.J.Q.B. 251, where the contrary view has been expressed by Crompton, J., was thought not to be good law. He points out that the question came under review in the House of Lords in the *Essex v. Acton Local Board*, 14 App. Cas. 153, "and it must now be taken to have been decided that a person whose land has been taken is entitled to compensation which he would not have been entitled to, if none of his land had been taken."

Lord Watson in the *Cowper-Essex Case*, at p. 166, when referring to *Caledonian R.W. Co. v. Ogilvy*, 2 Macq. 229, and to *City of Glasgow Union R.W. Co. v. Hunter*, L.R. 2 H.L. Sc. 78, said that in both of these cases "land had been taken from the claimants for railway purposes, but the use complained of was held in both cases to afford no ground for statutory compensation. It appears to me to be the result of those authorities, which are binding upon this House, that a proprietor is entitled to compensation for depreciation of the value of his other lands, in so far as such depreciation is due to the anticipated legal use of works to be constructed upon the land which has been taken from him under compulsory powers."

Buckley, L.J., in the *Horton v. Colwyn Case* (1908), 1 K.B., p. 339, very clearly points out the result of the decisions upon the difference in the rights of a person, a part of whose land has been taken for the purposes of a railway, and that of a person who is injuriously affected where no lands have been taken. He says the principal of the *Stockport Case* was applied and extended by the House of Lords in *Cowper-Essex v. Acton Local Board*, 14 App. Cas. 153, to this extent, "that if the claim is by a person from whom land has been taken compulsorily, he may have compensation for damages sustained by the injuriously affecting of other lands of his, and such damage is not confined to damage in construction, but extends to damage in user of that which is constructed on the land taken from him."

But no case has been cited, and none I think exists, in which the doctrine has been applied to damage occasioned by works erected upon land not taken from the claimant. On the contrary, there is authority that in that case the principle does not apply." He then quotes the language of Lord Chelmsford in *City of Glasgow Union R.W. Co. v. Hunter*, L.R. 2 H.L. Sc. 78, as follows: "But the claim in the present case does not arise out of anything done on the land taken, nor in respect of any property of the respondent connected with the land so taken, but from the construction of a railway bridge over the land of another person;" and points out that Lord Chelmsford, at p. 83, laid down this proposition, that, as no part of the claimant's property had been injured by anything done on his land, his right to compensation for damage was precisely the same as if none of his land had been taken by the company. In *Rez v. Mountford* (1906), 2 K.B. 814, land had been acquired by a tramway under its compulsory powers for the purpose of widening a road upon which the tramway was to be constructed. The tramway was laid, not upon the piece of road so taken, but on the land of the road as it had originally existed. It was held that the claimant was not entitled to compensation for injury to his property by reason of the user of the tramway on the old piece of road.

In the present case it is perfectly clear that the arbitrators took into consideration and based the amount of damages allowed on the depreciation of the claimant's land for the damage resulting to the property by reason of the operating of the railway in connection with the freight shed and freight yard. In their reasons for the award it is said: "This freight yard is a new creation, it is in close proximity to the remaining portion of Gordon's lands, and we are of opinion, by reason thereof and the authorities cited, Gordon should be fully compensated for his lands and for all damages consequent upon the construction of the new freight yard and operation thereof by the company; in other words, admitting for sake of argument only, that the track upon Gordon's expropriated land will not be used for the

shunting of cars by engines thereon, the use of the remainder of the yard, all upon newly acquired lands, by the constant use of engines thereon in the moving of freight cars, covers the whole yard so as to allow Gordon, under the Act and the cases cited, to claim damages by reason of smoke, cinders, vibration and noise." There are other references to the freight yard that make it clear that damages were allowed on the basis of depreciation from traffic to and from the yard, whether over the land acquired from the plaintiff or not.

I am of opinion that in allowing such damages the majority of the arbitrators were in error, and that the damages to be allowed should be limited to the present and anticipated use of the land so taken from the claimant. There may be another track put down over this land, and the tracks passing over the land may be used as switches to connect with other tracks, and with the freight shed in the yard, so that there may be considerable traffic passing over the land taken. This may be taken into consideration by the arbitrators in assessing damages, but not the depreciation to the land from the traffic when not passing over the land so taken. In other words in the language of Lord Watson, the proprietor is entitled to compensation for the depreciation of the value of his other lands, in so far as such depreciation is due to the anticipated legal use of works to be constructed upon the land which has been taken from him under the Act.

There is a further principle to be considered in assessing damages, having regard to the peculiar suitability or adaptability of the land for the purpose for which it is required. This question was carefully considered in *Re Lucas and Chesterfield Gas & Water Board* (1908), 1 K.B. 571. It will be seen, from a reference to that case and the authorities there cited, that adaptability may be an element which ought to find a place in the estimate of the amount of compensation. Yet underlying it is the further question whether there is a possible market for the land in question, and, in determining that, the statutory purchase is not to be considered. They are entitled,

however, to consider the fact that the lands sought adjoin the station grounds, and may therefore have a special value, in the view that the railway company might require additional land, and would be willing to give a higher price because it adjoined the station grounds.

The distinction here taken is rather fine, but I think appreciable, and I understand to be this: the arbitrators are not to consider as an element of damage, the fact that the railway company must have the land owing to its peculiar position, but that, aside from the proceedings taken, the fact that the land adjoins the railway premises and is convenient for extension of their yard, irrespective of the present application for compulsory purchase, may be taken into consideration.

The award must be set aside and the question referred back to the arbitrators for further consideration and award. The costs of the previous proceedings and of this motion must be disposed of on the final motion for judgment. If the parties consent, I will dispose of the whole question upon the material before me and direct judgment for such amount as I think proper, and dispose of the costs.

NEGLIGENCE—LEVEL CROSSINGS—SIGNALS.

CANADA.]

[SUPREME COURT.

GRAND TRUNK R.W. Co. v. SIMS.

(Unreported.)

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Operation of railway—Level crossing—Negligence—Statutory signals—Findings against weight of evidence—New trial—Practice.

S. sustained injuries through running into the engine of a railway train while he was riding a bicycle over a level highway-crossing. On the trial of his action to recover damages, his witnesses stated that they had not heard the whistle sounded nor the bell of the engine rung, and he admitted that he had not taken any precautions to ascertain whether he could cross the track in safety. The evidence for the defence was positive as to the statutory signals being properly given, as well as other warnings of danger.

Held, per Fitzpatrick C.J. and Duff J., that the question was not as to the credibility of the witnesses on either side, but whether the character of the evidence for the plaintiffs could, in a reasonable view of the whole evidence adduced, be held to countervail the direct and positive testimony on behalf of the defendants, and, as it could not, the findings by the jury that the company had been guilty of negligence in failing to give the statutory signals were against the weight of evidence and unreasonable.

Per Girouard J. that S. was guilty of contributory negligence in failing to take proper precautions to avoid the accident and the action should be dismissed. *Railroad Company v. Houston* (95 U.S.R. 697), referred to. The judgment appealed from was reversed and a new trial ordered, Idington and MacLennan JJ. dissenting.

PRESENT: Sir Charles Fitzpatrick, C.J., and Girouard, Idington, MacLennan and Duff, JJ.

APPEAL from the judgment of the Court of Appeal for Ontario which affirmed the judgment in favour of the plaintiffs entered, by Magee, J., on answers by the jury to questions submitted to them at the trial.

The circumstances of the case, in so far as they are material, are sufficiently set out in the judgments now reported.

The action was by the minor plaintiff, by his next friend, and his father, and was first tried before Street, J., and a jury who found answers to certain questions, and judgment was entered for \$2,500, the amount of damages found. On appeal, the Court of Appeal for Ontario directed a new trial, which was

subsequently had, before Magee, J., when the jury, in answer to questions submitted, found that the servants of the company, in charge of the locomotive engine, had failed to give warning of the approach of the train by sounding the whistle and ringing the bell of the engine as required by the statute, and assessed the damages at \$1,500, for which amount the learned Judge directed judgment to be entered in favour of the plaintiffs. This judgment, on the second trial, was affirmed by the judgment now appealed from.

The appeal was heard on the 28 and 29 October, 1907.

Wallace Nesbitt, K.C., and *D. L. McCarthy*, K.C., for the appellants.

John Macgregor, for the respondents.

December 13, 1907. THE CHIEF JUSTICE:—In the case of *Wabash R.W. Co. v. Misener*, 38 S.C.R. 100, speaking for the majority of the Court, Mr. Justice Sir Louis Davies said: "I do not desire, even by implication, to cast a doubt upon the reasonable and salutary rule so frequently laid down by this Court as to the duty which the law imposes upon persons travelling along a highway while passing or attempting to pass over a level railway crossing. They must act as reasonable and sentient beings and, unless excused by special circumstances, must look before attempting to cross to see whether they can do so with safety. If they choose, blindly, recklessly or foolishly to run into danger, they must surely take the consequences."

In this case, the plaintiff admitted that he did not look, listen or take any precaution whatever to ascertain if he could with safety cross the appellant company's track, although he knew that there was a track in the neighbourhood.

The trial Judge would, in my opinion, have been justified in withdrawing the case from the jury, but I agree in the conclusion reached by my brother Duff to grant a new trial. To that small measure of relief, the appellants are entitled. The judgment of the majority of the Court is that this appeal should be

allowed with costs here and in the Court of Appeal and a new trial is ordered, the costs of the former trial to abide the event.

GIBOUARD, J.:—This is a railway accident case. The respondent was about to cross the track of the appellants. He admits, in his evidence, that he did not look. In his examination, the respondent gives the following evidence:—

“Q. Did you look? A. No.

“Q. Before you came to the dwelling-house, you had also a clear view of the track, about a thousand yards up? A. I do not know.

“Q. Did you not look? A. No.”

On several occasions, we have intimated that a person about to cross a railway track is bound to use his senses, to listen and to look, if he has ears and eyes, in order to avoid any possible accident from an approaching train.

This rule has been laid down many years ago by the United States Supreme Court in *Railroad Company v. Houston*, 95 U.S.R. 697.

Under the new “Railway Act,” section 391 provides that a railway company shall be liable for all damages sustained by any person by reason of any failure or neglect to sound the whistle or ring the bell. The clause embodies purely and simply the rule of the common law, and the legislature thought that it was necessary to insert it in order not to leave an impression that the above failure or neglect will only involve a penalty as enacted in the first part of the same section. That section is the mere reproduction of section 256 of the Railway Act of 1888.

It has never occurred to anyone that its effect would be to repeal and it does not repeal the rule of contributory negligence provided by the English common law.

I would, therefore, allow the appeal and dismiss the respondent’s action with costs before all the Courts.

IDINGTON, J. (dissenting):—The respondent, Alexander Sims, recovered in an action in the High Court of Justice for Ontario

damages for injuries done to him by the appellants' train at a crossing on Bloor Street, in Toronto.

The action has been tried twice. The jury found that the appellants in charge of their locomotive neither blew the whistle nor rang the bell as required by the statute. It is stoutly contended, however, that the respondent, Alexander Sims, was, by reason of his contributory negligence, deprived of any right to complain of such neglect.

He was riding his bicycle along a narrow path, constructed for the use of bicyclists on said street. The contention is that he ought to have seen the coming train and stopped.

It is quite clear that from a point in the path along which he rode, at least one hundred and thirty-seven feet and, possibly, one hundred and fifty feet from the railway track, he could, if he had looked, have seen the coming train.

He was preceded a few feet by a friend riding on another bicycle. The usual painted signs were up marking the crossing. The fences on either side of the highway separating the railway's right of way from the highway were painted white. The track was raised a few feet above the general level of the street but, of course, with usual grading of the approach.

At a point about thirty feet from the railway track, he had, in pursuing his journey, to diverge from the straight line of the straight path he rode upon, to take to the main part of the highway.

He knew there was a railway to be crossed somewhere on his way. He had gone along the street two or three times and, possibly, three or four times before. He had not travelled the road habitually. He was a young Englishman under twenty-one and not long in the country. He was returning from his work a little after six p.m. in July. He was going about five or six miles an hour. He was travelling from west to east and the train from north to south. The crossing was at right angles or nearly so.

On his left hand and passing over the one hundred and thirty-seven feet of space particularly in question, he had to pass

a telephone pole, a hydrant and an electric light pole in close proximity to the path. Near to one of these poles, about thirty-five feet from the track, there stood, chatting, a man and a woman. The man was resting on his bicycle in such a fashion as to obstruct the path, and Mr. Prince, the respondent's friend ahead, warned him off, and then he moved, but, no doubt, this incident diverted the attention of both bicyclists in question.

Stress was laid in argument before the jury as to the need of respondent guarding against the poles and hydrant referred to. The respondent does not, in his evidence, attach so much importance to that necessity as his counsel does. Immediately they had passed the man and woman referred to, some one called to them to look out. Prince got across. But respondent struck the track just when the engine reached the same spot, struck him and carried him some distance to the south of the highway.

At this instant, and not before, he says he heard the shout, the noise of the train and a whistle. He swears he did not know he had reached the railway crossing or the immediate approach thereto until his wheel struck the track.

Do these facts present a case that, as a matter of law, must be dismissed without submitting it to the jury? Did the respondent act as an ordinary, prudent man should act? Or did he act so negligently as to deprive him of all right to complain?

At five miles an hour, the whole time consumed in passing over the hundred and thirty-seven feet of open space was about seventeen seconds. How many of these seconds am I to allot to such a traveller to enable him to recognize that he had got past the obstruction to his view and into open space? How many am I to allot to the looking southward? How many am I to allot to the diverting obstruction in front of him? How many for the needed care created by the divergence from straight bicycle path to roadway? How much am I to allow for the other things to be passed and guarded against? How many should be allowed for the slow working of the average mind managing a bicycle?

Am I to deprive bicyclists of all right to rely on those means the law has declared shall be used for their protection by those in charge of a train?

If every second of a man's time must be devoted, in travelling along the highway, to watch for trains, then this man was negligent. If not, and he is ignorant of the exact locality, as this man swears he was, then I am unable to say not only that he was negligent, but also to say that if ten men out of twelve, just as competent as I to pass upon such a question, should say he was not, then they acted quite unreasonably in so doing.

The jury are entitled to take into account every fact and circumstance that might, in the surrounding conditions in question, influence an ordinary prudent man in guiding his carriage of himself along the highway.

The man on horseback, riding along the same road, in early morning, with all his faculties awake, has little excuse if he miss seeing the approaching train.

Indeed, such an one, perchance possessed of unusual clearness of eye and brain, can hardly comprehend how the poor stupid, overburdened, weary wight, drifting home in the evening, fails to know where a railway or its crossing is and to see the signs thereof.

The jury are better able than the man on horseback to comprehend the measure of prudence that is possible to this man, who is, after all, typical of the ordinary man who uses the highway.

It was for this ordinary man the enactments relative to bells and whistles were made. They never could have been otherwise necessary for travelling by day. And, if we were to lay down the rule, the railway companies sometimes ask us to apply, these requirements might as well be repealed so far as daylight travelling extends.

I regret to find that in a place where the duties of the jurors were, by reason of the facts, of so very delicate a character they were appealed to in a way they should not have been.

I reluctantly accept the reasoning of the Court below upon

this point. It seems settled that where no clear unmistakable exception was taken, as is pointed out, to the learned trial Judge's charge in this regard, it would be like an interference with a matter of procedure for us to declare the Court below wrong in this regard, as well as violating a well recognized rule of law, to do so. Objection to misdirection must be made at the proper time.

In regard to the admissibility of the irrelevant evidence objected to and received, I cannot say we would be justified in granting a new trial under all the circumstances of this case; although I entertain a very strong opinion for the need of excluding everything irrelevant that tends to inflame the mind, especially when the circumstances are, as here, quite distressing enough without permitting such improper means of doing so.

I think the appeal should be dismissed with costs.

MACLENNAN, J., also dissented from the judgment allowing the appeal.

DUFF, J.:—I think there has been a miscarriage in the verdict in this case; and that there should be a new trial.

One is naturally very reluctant to disturb the verdict of a jury where the evidence is of such a character that the trial Judge would not have been justified in taking the case into his own hands; and especially where the case has been before two juries who have taken the same view of it. But, being satisfied that the verdict is against the weight of evidence—in the sense that it is one which could not reasonably have been found by a jury applying their minds impartially to the evidence as a whole and judicially weighing it in relation to the questions of fact before them—one must, of course, give effect to one's conclusion. In that sense, the finding of the jury that the defendants did not, by ringing the bell of the engine give one of the warnings required by the statute, is not, I think, reasonably supported by the evidence.

As there is to be a new trial, I refrain from entering into a

discussion of the evidence except to make an observation which, because we are reversing the judgment of the Court of Appeal, ought, I think, to be made.

Mr. Justice Garrow, who delivered the judgment of the majority of that Court, treats the case as one in which, there being reasonable evidence both ways, the findings of the jury, who have chosen to believe the plaintiff's witnesses, are conclusive. With great respect, I think there is no room for the application of that principle here. The evidence offered by the plaintiff does not strictly meet that offered by the defendants; it is not in the same plane. It is not necessary, in order to give full effect to the testimony of the defendants' witnesses upon the point in question, to disbelieve that of the plaintiff or of witnesses he called on his behalf. The question is not whether the plaintiff and his witnesses should be believed, but whether evidence of the character given by them could be held, in any reasonable view of the evidence as a whole, to countervail the body of direct and positive testimony adduced on behalf of the defendants. In my opinion it could not.

The circumstance that two juries have taken the same view is, of course, entitled to not a little weight; but, on the other hand, it is not conclusive. *Dunsmuir v. Lowenberg*, 30 S.C.R. 334.

Appeal allowed with costs.

W. H. Biggar, for the appellants.

E. W. J. Owens, for the respondents.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

ONTARIO.]

[DIVISIONAL COURT.]

TINSLEY V. TORONTO R.W. Co.

(15 O.L.R. 438.)

Street railways—Accident—Contributory negligence—Nonsuit.

The plaintiff, intending to take a street car going westerly, so as to reach his house, on arriving, shortly after midnight, at the southerly side of the street on which the particular car line was, saw a car coming westerly about 300 feet off, and without again looking for the car he attempted to cross over the street in a westerly diagonal direction, so as to reach a street corner, where he expected the car would stop, it being, as he said, the usual practice for all cars to stop there, though it appeared there was no rule requiring them to do so, and because he saw two persons standing at the corner apparently waiting for the car, and who had signalled it to stop, but of this he was not aware. The car, however, ran past the corner, knocking down the plaintiff and severely injuring him. The motorman had seen the plaintiff when the car was about 150 feet off. It was claimed that the motorman was intoxicated and incapable of knowing what he was doing, and that the car was going at an excessive rate of speed. The place was well lighted and nothing to obstruct the view:—

Held, that the accident was attributable to the plaintiff's own want of care in attempting to cross over the street as he did, and that the case, therefore, should have been withdrawn from the jury.

Magee, J., dissented on the ground that it was a question for the jury. Judgment of Britton, J., at the trial reversed.

THIS was an action tried before Britton, J., and a jury, at Toronto, on October 1st, 1907. It was brought to recover damages for injuries sustained by the plaintiff through the alleged negligence of the defendants.

J. H. Denton, for the plaintiff.

D. L. McCarthy, for the defendants.

The plaintiff, who resided in the western part of the city of Toronto, had been down town, and was returning home early on the morning of the 1st January, 1907, at about 12.40 o'clock. On his way up he had got on University street (which immediately adjoins the Queen street avenue on the east) from the street just south of College street. He then went north on University Street, intending to take a College street car going west.

When he got to the south side of College street he looked to the east, and saw a car coming westerly, about one hundred yards off, and wishing to take this car, he attempted to cross over College street in a diagonal direction westerly, so as to reach the north-east corner of College street and Queen's Park avenue, where, he said, the car usually stopped, and where, he presumed, it would then stop, as he saw two persons standing on the corner waiting for the car. The car, however, ran past the corner, and struck the plaintiff, so severely injuring him that he was rendered unconscious. The next he knew of it was when he found himself laid up in bed. He was so dazed that he had very little recollection of what had taken place.

Mr. Shepherd and his wife were the persons who were standing on the corner waiting for the car. Mr. Shepherd was called as a witness for the plaintiff. He said he saw the car for some distance before it reached the corner, and as it approached he got off the sidewalk, where he was standing, and went out towards the track, and signalled the car to stop, but his signal was disregarded, and the car ran past the corner, striking and injuring the plaintiff.

It did not appear that the plaintiff had seen the witness signal. It was proved that the corner in question was well lighted by an electric light.

The motorman admitted he saw the plaintiff crossing the street when the car was about 150 feet away.

Evidence was also given for the plaintiff, but which was denied by the defendants, that the car was running at an excessive rate of speed, namely, at twenty miles an hour; and that the motorman was under the influence of liquor at the time, and therefore unable to properly manage the car.

At the close of the plaintiff's case a nonsuit was moved for on behalf of the defendants, which was renewed at the close of the whole case, but which was overruled, the ground being that the plaintiff, by his own conduct by attempting to cross in front of the car without looking to see where the car was, was the author of his own injury.

The learned Judge, in his charge to the jury, pointed out that the grounds of negligence relied on by the plaintiff were; the too high rate of speed; not stopping at the corner, and not slowing up when approaching the corner; and that the motorman was not in a proper condition for the safe running of the car.

He left certain questions to the jury, which, with the answers thereto, were as follows:—

1. Q. Were the defendants guilty of negligence which occasioned the accident; and, if so, what was that negligence? A. Yes; not stopping on signal; not having the car under control when approaching the corner.

2. Q. Was the plaintiff negligent and did his own conduct cause the accident? A. No.

The jury assessed the damages at \$800, for which judgment was entered for the plaintiff.

From this judgment the defendants appealed to the Divisional Court.

On December 5th, 1907, the appeal was heard before BOYD, C., MAGEE and MABEE, JJ.

D. L. McCarthy, for the appellants. There was no evidence of negligence on the part of the defendants to submit to the jury. There was, however, clearly such contributory negligence on the plaintiff's part as would prevent his recovery. The evidence shews that when the plaintiff reached College street he saw the car coming westward, about 100 yards off. He then attempts to cross the street without again looking to see where the car was, his excuse being that he thought it would stop there, it being the custom for cars going west to stop at that corner, and also because he saw two persons standing at the corner waiting for the car. There is, however, no rule requiring the cars to stop at this corner unless to let persons off or on, and this is especially so with the night cars, while the fact of the two persons standing at the corner did not necessarily prove that they wanted to get on and that the car would stop there, and the

plaintiff does not say that he saw them signal the car to stop. Had he looked for the car while crossing, he would have seen it would be impossible for him to cross in safety. The learned trial Judge should, therefore, have acceded to the motion made by the defendants, and nonsuited the plaintiff. The case of *Allen v. North Metropolitan Tramways Co.* (1888), 4 Times L.R. 561, is a very strong case in favour of the defendants. There the plaintiff was struck by a tram-car on a bridge. He had not looked for the car, because he expected the car to stop, as he understood it was customary for cars to do so. It was held that this was no excuse; that it did not relieve him from the duty of looking out. In *Skelton v. London and North-Western R.W. Co.* (1867), L.R. 2 C.P. 631, where there were several lines of railways and gates on either side of a level crossing, which it was the rule to keep shut when a train was approaching, and the plaintiff, finding the gates opened, attempted to cross the track without looking, and was struck by an approaching train, it was held that the neglect of the duty to keep the gate closed did not relieve the plaintiff from keeping a look-out. So in *Stubley v. London and North-Western R.W. Co.* (1865), L.R. 1 Ex. 13, where there was a dangerous level crossing and no watchman to warn persons about to cross, it was held that this did not relieve the plaintiff from looking out for an approaching train. So also in *Davey v. London and South-Western R.W. Co.* (1883), 12 Q.B.D. 70, where, notwithstanding the view was obstructed until within about six feet of the track, and no warning given of an approaching train, the same duty was held to be imposed. The Judge must decide whether or not there is reasonable evidence to submit to the jury: *Jackson v. Metropolitan R.W. Co.* (1877), 3 App. Cas. 193. The cases in our courts are all to the same effect: *O'Hearn v. Town of Port Arthur* (1902), 4 O.W.R. 209; *Gosnell v. Toronto R.W. Co.* (1895), 24 S.C.R. 582; *Gosnell v. Toronto R.W. Co.* (No. 2) (1904), 4 O.W.R. 213; *Gallinger v. Toronto R.W. Co.* (1904), 4 O.W.R. 522; *Bell v. Toronto R.W. Co.*, not reported; *Hill v. Toronto R.W. Co.* (1907), 9 O.W.R. 988. The American cases

are even stronger than ours: *McCullough v. Minneapolis, St. Paul, etc., R.W. Co.* (1894), 101 Mich. 234; *Ries v. St. Louis Transit Co.* (1903), 179 Mo. 1; *Lynch v. Third Avenue R.W. Co.* (1903), 88 N.Y. App. Div. 604. The case of *Preston v. Toronto R.W. Co.* (1906), 13 O.L.R. 369, is distinguishable, as the plaintiff was unable to avoid the car. It is for the Judge to say whether or not there is reasonable evidence to submit to the jury: *Jackson v. Metropolitan R.W. Co.*, 3 App. Cas. 193.

J. H. Denton, for the respondent. The corner in question was, undoubtedly, one of the places where it was customary for all cars to stop, but, in any event, it was the duty to do so when any one wanted to get off or on the car. The plaintiff saw Mr. Shepherd and his wife waiting for the car, and it is proved that the signal was given to stop the car, and the only question is, did the motorman see, or should he have seen, the signal. He admits he saw the plaintiff when he was 150 feet off, and made no attempt to stop the car or warn the plaintiff. The reason he did not do so was that he was under the influence of liquor, and did not know what he was doing. There is also no doubt but that the car was going at an excessive rate of speed, and this is important in considering the question whether the motorman had the car under proper control. There was abundant evidence of negligence on the defendants' part. Then was there evidence of such negligence on the plaintiff's part as would prevent his recovering. The plaintiff was rightly on the street and had the right to cross it, and not only was it the duty of the motorman to keep a look-out, but, under the circumstances, to stop at this corner, and the plaintiff might reasonably presume he would do so, and that he could safely cross the street in front of the car. The case of *Cranch v. Brooklyn Heights R.W. Co.* (1905), 107 N.Y. App. Div. 341, where the cases are collected, is strongly in point in favour of the plaintiff. In that case it was held that where it is shewn that it was customary to stop as here, the plaintiff would not be chargeable with contributory negligence because he assumed the car would stop. In every case it is a question for the jury whether or not the plaintiff

acted reasonably under the circumstances: *Dublin, Wicklow and Wexford R.W. Co. v. Slattery* (1878), 3 App. Cas. 1155. In *Preston v. Toronto R.W. Co.*, 13 O.L.R. 369, it was held that where there is evidence of negligence on the defendants' part by reason of the failure to take reasonable precaution to prevent accidents by ringing the gong, etc., the case must be submitted to the jury, notwithstanding there may have been acts on the plaintiff's part from which the jury might infer negligence on his part by putting himself in a position of peril. The same principle is laid down in *Vallee v. Grand Trunk R.W. Co.* (1901), 1 O.L.R. 224; *Sims v. Grand Trunk R.W. Co.* (1905), 10 O.L.R. 330; *Gosnell v. Toronto R.W. Co.*, 24 S.C.R. 582. The case of *Allen v. North Metropolitan Tramways Co.*, 4 Times L.R. 561, which was strongly relied upon, is quite distinguishable. There there was no rule requiring the car to stop, or anything to shew that it usually stopped there. In *Skelton v. London and North-Western R.W. Co.*, L.R. 2 C.P. 631, notwithstanding that the gates were up, the plaintiff knew that the lines were not clear. In *Stubley v. London and North-Western R.W. Co.*, L.R. 1 Ex. 13, the place itself was dangerous. It was not a thoroughfare as here. In *Davey v. London and South-Western R.W. Co.*, 12 Q.B.D. 70, the accident was solely caused by the plaintiff's own negligence. In all the cases relied on by the defendants there were special circumstances which cast a duty on the plaintiff to take extra precautions. Under the circumstances the case was properly submitted to the jury.

December 16, 1907. BOYD, C.:—The jury have found that the company was guilty of negligence (1) for not stopping when signalled, and (2) for not having the car under control when approaching crossings. They exculpate the plaintiff, and give \$800 damages.

Upon a consideration of the evidence it appears to be very plain that the plaintiff walked into a place of danger. Anyone who seeks to cross a track directly or diagonally in front of a coming car must use ordinary vigilance. Here this plaintiff

saw the car speeding towards the corner of College street and University avenue when it was 300 feet away, as he estimates. He was seen to be stepping off the curb and heading across the street diagonally from the south when the car was about 150 feet off, as Shepherd says; and so both moved on, he across the street and the car on the track, till he was struck by the foremost end of the car. This occurred at one in the morning, when the view was unobstructed all along College street to Yonge, and the car was moving rapidly (as all night cars run), with head light flashing, and full of people. The plaintiff admits having an unobstructed view of the car, and, indeed, says it was in full view as he passed diagonally across the street, getting closer to the track where he was struck. He says he had to go thirty feet and another thirty feet after he saw the car (sixty feet), and it was in full view of him all the time. The car he could see and he could hear, as it made a noticeable rumbling noise quite apparent. He makes no point as to the speed of the car; he says he cannot tell whether it was going fast or slow. He could have halted, he could have turned aside, even at the last moment, and avoided the impact. The car, coming at the pace it did, must keep straight on, and could not slow up *instantly*, as the man might have done. Why did he act so heedlessly? No excuse given except this, that he saw two people waiting for the car at the street corner, and he thought it was going to stop. It was argued as if the evidence reported him as having himself signalled to stop. That is not in the stenographic report before us; all that appears is that Shepherd at the corner gave a signal to stop (which the motorman says he did not see). The plaintiff did not give a signal, and does not say that he saw any signal given by the other. There was no rule, custom or practice as to slowing down or stopping at crossings on these night-runs, unless on the requirement of persons getting on or getting off the cars; so that the situation comes to this: he thought, or inferred, or supposed that the car was about to slow up or stop at the crossing, but his senses, sight and hearing would inform him that the car was not slowing; against what he saw and

heard, or might have seen and heard (for he was in possession, he says, of all his faculties) he acted on an assumption—in other words, he took chances of getting over ahead of the rapidly moving car and failed. Can he be said to be acting with due care? Was his conduct not (to put it in the mildest way) heedless? Was he not the victim of his own disregard of consequences? Did he not in a very distinct way contribute to his own hurt? It is not needful to say that he was most to blame; if he, in fact, contributed to the injury he cannot recover.

Such seems to me to be the proper result of all the evidence given on his behalf, and his case is not bettered by the further evidence given for the defence.

It follows, in my opinion, that the action should have been dismissed.

As to authorities, the case of *Allen v. North Metropolitan Tramways Co.*, 4 Times L.R. 561, appears to be very close to the facts now in hand. That case was acted on by the Court of Appeal in *Follett v. Toronto R.W. Co.* (1888), 16 A.R. 346, at p. 353 (see also *Halifax Electric Tramway Co. v. Inglis* (1900), 30 S.C.R. 256, at p. 280). My brother Mabee has gone very fully into the list of cases which throw more or less light on the general subject of accident in crossing before running cars, and I abstain from citing more.

The nearest case relied on by the plaintiff is *Cranch v. Brooklyn Heights R.W. Co.*, 107 N.Y. App. Div. 341. It is distinguishable in two respects: (1) that the plaintiff was going over the track on a private right of way, seeking the station to take a train at a highway crossing, and it was held that the plaintiff need not in such a place use the same circumspection and care as a traveller crossing a railroad track on a public highway, and (2) that the company by its manner of operating the line—i.e., being in the custom of stopping at the station—created a condition of things known to the plaintiffs for sixteen years, which justified the belief that the train would not run across the highway without stopping. To counterbalance the New York case I may refer to a New Jersey case, *Jewett v. Patterson R.W.*

Co. (1898), 62 N.J. Law 424. I follow the principle of decision in the *Allen Case*. I would dismiss the action. It is not a case for costs.

MAGEE, J.:—From the evidence as it stood at the close of the plaintiff's case the jury might have found that the plaintiff, when going about 12.45 a.m. on 1st January, 1907, in a north-westerly direction across the intersection of College street and University avenue, was struck partly from behind by the defendant's car going west on their north track on College street; that the plaintiff was at the time hurrying to cross the north track, so as to take passage on the car; that the car had been and was then going at an excessive speed of eighteen to twenty miles per hour, but for which the plaintiff would have had time after he first saw the car to cross the track in safety; that the motorman was noticeably under the influence of intoxicating liquor when placed in charge of the car about half an hour previously; that it was his duty under the company's rules and was the custom of all cars to stop at the east side of University avenue, eastward of where the plaintiff was struck, whenever passengers wished to get off or on the car; that the motorman could see two intending passengers waiting to get on the car there, and could see one of them signalling for him to stop; that the plaintiff had seen the intending passenger signal; that the motorman did not stop or slacken speed; that had he stopped the plaintiff would have crossed in safety; that in the direction in which the plaintiff was walking he would have his back turned partly to the approaching car, and would be going into danger if he or the car did not stop or slacken speed, as the motorman could see, and the latter had no reason from any action of the plaintiff to know or believe that the plaintiff would stop or lessen his pace or change his course or was aware of his danger; that it was, under the company's rules, the duty of and was usual for the motorman to ring the gong whenever necessary to attract attention, and it was, under these rules, his duty to slacken speed and get his car under control whenever there was reason to appre-

hend danger; that he did not do any of these things nor in any way try to warn the plaintiff; and that it was also his duty, when approaching a cross street, to reduce speed and keep the car carefully under control if there were any persons standing there or if there was likely to be anybody crossing there; and that it was also his duty, when starting after a stop, always to ring the gong to warn people on the street; and that in none of these respects to the extent I have stated them were the rules suspended at night.

On the other hand, the evidence for the plaintiff also shewed that on arriving at the south side of College street, about twenty yards east of University avenue, he had looked for and seen the approaching car, then about 100 yards distant; that he then turned in the diagonal north-westerly direction and hurried to cross College street, for the purpose of getting on the car by its door on the north side; that his course would take him across the north track in front, that is west of where the car would usually stop; that he made no signal for it to stop, but, as he stepped off the curb to cross the carriage way of College street, he saw one of the intending waiting passengers signal to the car, then about fifty yards distant, to stop; that, although he had seen the car at first, and knew it was approaching University avenue, and did not know at what speed it was coming, and he was intending to get on it, and had to cross the south track first, he did not at any time after he first saw the car look towards it again, or do anything to ascertain its position, and he, without taking any precaution, stepped upon the north track, in front of the car, when it was moving rapidly only a few feet from him; that he was only thirty-one years of age, in good health, and in possession of sight and hearing, and capable of taking care of himself; that the street was well lighted at that crossing, the car had the usual head light, and was bright with inside lights, and was making considerable noise, and could readily have been seen and heard by him had he exercised his faculties; and that there were no vehicles or traffic upon the street to distract his attention, and the night was comparatively mild and

soft; that his reason for undertaking to cross the track at that time was that he wished to get on the car, and he thought, when he saw persons waiting for it, that it was going to stop, and he thought that anyone would think so. He had lived most of his life in Toronto, and might be presumed to know that such was the custom. He claimed that his memory was affected as a result of his injury, and the jury might consider that for that reason he was not able to give so full an account of the occurrence and what led to it as would otherwise be expected, and that in that respect and in drawing inferences the case might to some extent be treated as if the injury was fatal, and the injured man was not here to tell his story.

It may here be noted that by clause 39 of the conditions of the defendants' agreement with the city corporation, made binding by 55 Vict. ch. 99 (O.), it is provided that cars shall only be stopped clear of cross streets.

Whether the plaintiff in a given case has failed to prove that the conduct of the defendant, though negligent, was a cause of the injury is one question, and whether it has been shewn that the plaintiff has himself contributed to that injury is another question. The two have not always been kept distinct, and it is often very difficult to keep them so. But before a case can be withdrawn from the jury on the former ground, the Judge must decide that there is no evidence on which, if believed, the jury might reasonably infer negligence of the defendant to which the plaintiff's injury is attributable; while before he withdraws it on the latter ground, he must decide that on the evidence and the inferences therefrom, which are both unquestioned by the plaintiff, the jury must, if submitted to them, find contributory negligence of the plaintiff: *Jackson v. Metropolitan R.W. Co.*, L.R. 3 App. Cas. 197; *Bridges v. North London R.W. Co.* (1872), L.R. 7 H.L. 213; *Dublin, Wicklow and Wexford R.W. Co. v. Slattery*, 3 App. Cas. 1155.

In the present case it is not here a question of new trial, but, as in the *Slattery Case*, of the right of the defendants, in a case

in which the issues were to be tried by a jury, to have judgment entered for them irrespective of the jury.

On the first ground open to the defendants, that there was not sufficient evidence to go to the jury that they were at all negligent, little need be said. There was evidence from which, if unanswered, the jury might infer negligence in placing an intoxicated man in charge of the car, in excessive speed, and failure to slow the car and have it under control when approaching persons on the street; in failure to warn the plaintiff, by gong or otherwise, when seen going apparently unconsciously into danger; in failure of the motorman to keep watch for waiting passengers and persons on the highway; in failure to apprise one lawfully using the highway in manifest reliance upon the motorman stopping in accordance with his duty and constant custom that he was departing from such custom; and in the motorman neglecting to stop for passengers, though it is questionable if the plaintiff could complain of that, except in so far as a stoppage would have prevented the injury.

The fact that the jury, after hearing the evidence on both sides, did not infer all these matters of negligence does not help the defendants if the jury might have inferred them on the evidence for the plaintiff.

On the second ground here open to the defendants, that there was not sufficient ground to go to the jury that any negligence which the jury might infer was so connected with the plaintiff's injury that it could be attributed to such negligence, I think the answer must be that there was. In the *Slattery Case* Lord Cairns, at p. 1167, after referring to the facts, said: "Now, I cannot say that these considerations ought to have been withdrawn from the jury. I think they should have been submitted to the jury, in order that the jury might say whether the absence of whistling on the part of the train or the want of reasonable care on the part of the deceased was the *causa causans* of the accident." If in his Lordship's statement of facts preceding these words we substitute a flurried state of mind not to miss the half-hourly car for a like flurry on behalf of a friend,

and a gong for a whistle, and add to the failure to look for the train before stepping on the track, a reasonable belief that it had stopped, I cannot substantially distinguish the cases: see also *Green v. Toronto R.W. Co.* (1895), 26 O.R. 319.

The case of *Phillips v. Grand Trunk R.W. Co.* (1901), 1 O.L.R. 28, was referred to as shewing that the defendants' alleged negligence there in running an engine backwards without warning to plaintiff was not the cause of the injury, but the plaintiff's negligence in walking along the track; but there the late Mr. Justice Street said if the plaintiff had been crossing the track it would have to go to a jury.

On the third ground here open to the defendants, that on the evidence for the plaintiff, unquestioned by him, the jury must infer contributory negligence, it appears to me the defendants should fail. It was said that he had no right and no one has any right to rely upon the cars stopping in accordance with the rules of the company and their constant custom, and that it is such negligence if he does do so, and suffers injury in consequence, as makes him the author of his own wrong. In Toronto, as in other large cities, there are points of congested traffic where the cars invariably stop at intersections of streets whereon are the defendants' lines. Thousands of pedestrians and drivers, relying upon that stoppage, pass and repass in front of the cars with safety. Unless they did so, the streets would become blocked. If a driver, whose horses and waggon are, perhaps, twenty feet long, in reliance upon the car stopping there, starts along the intersecting street across the track, and the rear part of his waggon is caught by a car which, in defiance of rule and custom, and without warning, keeps on its course without stopping, must a jury say that he did not act reasonably and was negligent. I am satisfied no jury of reasonable men would say so. And yet if that driver would be justified in his confidence, it has no higher basis than the rule and custom of the defendants. Had it not been for that he would not think of risking himself on the ordinary rules of traffic (not to speak of the right of way given street cars) in front of a car which would so manifestly

reach him. Almost every moment mothers with children and business men engaged in conversation act upon the like faith. Then if he or they would be entitled to rely upon the rule and custom, why shall this plaintiff be told that he must not? Is it because of the more crowded condition of the streets in the one place than in the other? There are all degrees in quantity of traffic, and where is the line to be drawn, as a matter of law, so that we can say to a jury on this side you must find for the defendant, and on that side you may find for the plaintiff. I can conceive of evidence being given that in outer districts it is not customary for cars to adhere closely to the line of the street for a stopping point, and that they may sometimes over-run half the width of the street or more. But here there is no such evidence, and though jurors may be allowed to infer that street cars, no more than other vehicles, can be held to an exact line, it would be a question for them whether it had been reasonably adhered to and whether the plaintiff should be prepared for a particular variation. Here, however, on the evidence for the plaintiff, there was no intention of stopping, and the stopping place had been overshot at full speed. If, then, the law cannot fix the degree of traffic under which a plaintiff would not be entitled to rely upon the defendants' rule and constant custom, it must be left to the jury to say whether, under the particular circumstances in each case, he was so entitled. If it does not depend on the degree of traffic, then upon what else short of a warning would it depend, and here there was no warning. It must depend upon the fact of the rule and custom.

The case of *Allen v. North Metropolitan Tramways Co.*, 4 Times L.R. 561, was referred to, where a nonsuit, after being set aside, was restored. But there the plaintiff, being on a bridge, had started across two or three steps, and was struck by a tramcar; he had not looked in its direction at all, and he said it was usual for the tramcars to stop on the bridge, and he expected this one would do the same. The report is very short, and it does not appear how he expected it if he had not looked, nor on what part of the bridge it usually stopped. There does

not appear to have been any rule for stopping nor that the custom was invariable. The Court held that he walked into the tramcar. Here the plaintiff had his back partly turned to the car. And, which strongly differentiates that case from this as to the right to go to the jury, there was no chance for the driver to warn or avoid him. Here the jury might find that the motor-man could, by warning the plaintiff or retarding the car, have avoided the accident and his negligence therein would neutralize the plaintiff's negligence. That case, in the sudden stepping upon the track, resembles *Danger v. London Street R.W. Co.* (1899), 30 O.R. 493, and *O'Hearn v. Town of Port Arthur*, 4 O.L.R. 209.

In *Gosnell v. Toronto R.W. Co.*, 4 O.W.R. 213, where the plaintiff said he relied on the car slackening speed, and merely said they "generally always" did so, the Judge found no negligence in the motorman.

In *Preston v. Toronto R.W. Co.*, 13 O.L.R. 369, the rule as to sounding a gong and its non-observance were a material element.

In *North-Eastern R.W. Co. v. Wanless* (1874), L.R. 7 H.L. 12, the plaintiff was held excused from vigilance by the rules and customs of the company as to a gate for carriages being left open, although there was a separate gate for foot passengers, which it does not appear was open, and by his being, in consequence, in a position "more or less embarrassing."

In the *Slattery Case*, it was considered by most of their Lordships that the absence of the usual whistling might reasonably have been considered by "the jury to have influenced the course taken by the deceased, and thus caused the accident": Lord Penzance, at p. 1174; and his Lordship added: "I think it impossible to deny this; it might be that, being accustomed to the station . . . he expected the whistle as usual, and not hearing it, did not think the train was coming; or it might be that had the whistle sounded it would have awakened him to his danger in attempting to cross the line, though his mind was so occupied with the desire of getting his friends across to where

he stood that he failed to hear the sound of the wheels, and did not look up the line, as he ought to have done, to see if a train was coming."

In *Skelton v. London and N.W. R.W. Co.*, L.R. 2 C.P. 631, the plaintiff relied upon the fact of a gate being usually fastened by the company when their line was not clear, but it was shewn it was not invariably so, and that the deceased knew the line was not clear.

In *Cranch v. Brooklyn Heights R.W. Co.*, 107 App. Div. N.Y. 341, the plaintiff crossed in front of a train which she believed would stop in accordance with custom, and she was injured, and the verdict in her favour was upheld in appeal. Jenks, J., in delivering the judgment of the majority of the Court, said at p. 343: "This case may be discriminated . . . in that the evidence in this case for the plaintiff was that the custom was practically uniform." . . . "There is evidence that the plaintiff, who had lived in the neighbourhood for sixteen years, and had taken these trains constantly, believed reasonably that it was the uniform custom of all trains to stop before coming to the point at which she attempted the crossing."

It may be and probably is the fact that, the plaintiff knowing, as he thought, that the car would stop, his mind momentarily and automatically, if I may use the term, dropped any care upon that subject, and became set for the instant upon the necessity of getting across in time to get on board before the car started again. Momentary forgetfulness, though a dangerous doctrine in its application, was, as in other cases, held not to be necessarily negligence in *Scriver v. Lowe* (1900), 32 O.R. 290, and was considered a proper matter to be left to the jury. .

Cases are many in which the necessity for care in crossing the tracks of railways is dwelt upon, but no case was cited in which it was held that under no circumstances is that care excused. I do not think it should be held unreasonable for a jury to say that it would be excusable from a belief created by the rule and custom of the defendants themselves that the necessity for it did not exist. Surely, if there is a departure from a well-

known practice, on which in daily life men are wont to rely, greater care is required from the one who makes the departure, and knows his own intent, than from the one who does not know that intent.

The jury here have found in favour of the plaintiff. If their findings were moved against, would they be interfered with? From the decisions in such cases as *Preston v. Toronto R.W. Co.*, 13 O.L.R. 369, *Morrow v. Canadian Pacific R.W. Co.* (1894), 21 A.R. 149, and *Gosnell v. Toronto R.W. Co.* (1894), 21 A.R. 553, and 24 S.C.R. 582, I do not think they would.

I think the case could not have been withdrawn from the jury, and therefore the judgment should stand.

MABEE, J.:—The plaintiff's case is that on the evening of December 31st last, or, perhaps, just past midnight, at the south-east corner of University and College streets, he saw a car about one hundred yards to the east, travelling west along College; he also saw a lady and gentleman standing at the north-east corner of College and the entrance to the park, the place one would stand who intended taking a westbound car on College. The plaintiff, desiring to take this car, crossed College diagonally to reach the point where he expected the car to stop. It did not stop, but struck him and inflicted serious injury. The plaintiff says: "I thought the car was going to stop; naturally anybody would when they saw the man waiting for the car, they would think the car was going to stop."

There was a clear view to the east, an electric light at the corner, no other car or vehicle in sight, and nothing to attract the plaintiff's attention from his situation in crossing the street with the car approaching. He says that he was perfectly capable of taking care of himself, and that he does not know whether the car was coming fast or slow, but that it was in full view, and that he knew while crossing the street the car was still coming. The gentleman standing at the opposite corner had signalled the car, but it does not appear that the plaintiff had seen any such signal or relied upon it, even if that would have made any difference to the case. There was some evidence

that the motorman had been drinking, although in the evidence adduced for the defence that fact was strongly controverted. The defendants' counsel moved for a nonsuit, and, although many witnesses were called for the defence, the case for the plaintiff was not put upon any higher ground than he himself put it.

The question is whether there should have been a nonsuit. The jury found the defendants' negligence to consist of "not stopping on signal and not having car under control when approaching crossing."

I do not apprehend how the finding of not stopping on signal had anything to do with the matter. The plaintiff had given none, had seen none given, and was not relying upon a slackening of speed or a stopping in consequence of any signal given. His whole case consisted of an expectation upon his part that the car would stop because of the two persons standing at the corner.

The finding that the car was not under proper control, I presume, is based upon No. 58 of the company's rules, which was put in by the plaintiff, which provides that "when approaching crossings and dangerous places the speed must be reduced and the car kept carefully under control." It also appeared in the plaintiff's case that these rules did not apply to "night cars," but apart from this, was the speed of the car the proximate cause of the accident?

The plaintiff, among other cases, relied upon *Preston v. Toronto R.W. Co.*, 13 O.L.R. 369, but it seems to me the facts there are not at all similar to the present case. There the defendants had prevented the plaintiff turning his bicycle to the right; he then looked to the left side of the car, and saw and heard nothing to indicate danger in that direction; then it was shewn the defendants had omitted to sound the gong; this, had it been sounded, might have apprized the plaintiff of his danger.

Vallee v. Grand Trunk R.W. Co., 1 O.L.R. 224, was also relied upon, but, I think, does not assist. All that was held in that case was that the plaintiff was entitled to have had the sta-

tutory warning given. She saw the train when she was seventy feet from the track, and not before. The jury thought she had not been guilty of contributory negligence in approaching to that point without having seen the train; but suppose she had seen the train when she was a hundred yards away, and proceeded on her course, knowing the train was approaching, would it have not been a case of the plaintiff herself being the author of the accident?

Sims v. Grand Trunk R.W. Co. (1905), 10 O.L.R. 330, is different from the present case in a crucial point, and that is in *Sims* not seeing the approaching train, and defendants' omission to give a statutory warning. In the case in hand the plaintiff saw the approaching car, and the defendants are not in breach as to any statutory warning.

Gosnell v. Toronto R.W. Co., 24 S.C.R. 582, is another case where the plaintiff had not looked to see if a car was approaching, and all the case stands for is the principle that not to look is not contributory negligence.

I am not able to see how the speed of the car forms any element in the plaintiff's case. There is some authority for the proposition that had the plaintiff formed some judgment upon the speed of the car, and estimating the time, had concluded he could cross, being run down he could contend the defendants were in default in running the car at an excessive rate of speed, but I do not see how any such matter enters into this case. He paid no attention to speed, and formed no opinion as to his being able to cross in safety. In a dissenting judgment of Mr. Justice Gwynne, in *Gosnell v. Toronto R.W. Co.*, *ante*, it is said at p. 584: "This case does not turn upon a question as to the rate of speed at which the railway car was going immediately preceding the occurrence of the accident, but rather upon the conduct of the plaintiff himself in entering upon the track at the time he did; and, indeed, the rate of speed . . . assuming it to have been excessive, would seem to make the conduct of the plaintiff . . . only the more inexcusable." This has much greater force applied to a case where the plaintiff has seen the car ap-

proaching. The difficulty in the case in hand is to see in the plaintiff's evidence what facts exist that may reasonably be said to cut his conduct down to contributory negligence only, and to keep him out of the unfortunate position of having by his own reckless and heedless actions himself caused the accident. If he does not fall in the latter class, he has, of course, the right to have his case go to the jury.

A man, seeing a car approaching at a rapid rate of speed, grossly excessive let it be, walks in front of it, expecting it to stop, there being no duty to stop, whose is the negligence that in law is the cause of the accident that follows? The excessive and, let it be, unreasonable speed of the car was negligence by those in charge, but that was not the last negligent act that interposed; it was the unreasonable and negligent act of the man placing himself in a position of peril.

In the case of *Gosnell v. Toronto R.W. Co.* (No. 2), 4 O.W.R. 213, the plaintiff was nonsuited. He attempted to cross the street, having seen the car approaching (100 feet away), without looking for the car again, and governing his conduct accordingly.

In *Gallinger v. Toronto R.W. Co.*, 4 O.W.R. 522, a Divisional Court affirmed the nonsuit of Mr. Justice Ferguson, where the plaintiff alighted from a westbound car on the north track, and proceeded to cross the north and south tracks in front of an approaching east-bound car on the south track about 100 feet away, travelling from eight to ten miles an hour. No brakes were applied or gong sounded. In this case the plaintiff did not see the east-bound car approaching; had he looked and seen the car, and still attempted to cross, the case would have been much stronger against him.

In *Danger v. London Street R.W. Co.*, 30 O.R. 493, a Divisional Court affirmed a nonsuit where the plaintiff turned his conveyance upon the track without looking, and knowing a car was approaching. This car was travelling at a very rapid rate of speed, and no gong was sounded. The plaintiff's own negligence was held to be the proximate cause of that accident. *Davey v. London and South-Western R.W. Co.*, 11 Q.B.D. 213,

219, is quoted, and the words of Denman, J., in that case are particularly applicable here: "The plaintiff brought his injuries upon himself by his own act as much as if, *seeing the train* (car) *coming*, he had tried to cross in front of it": see also *Stubley v. London and North-Western*, L.R. 1 Ex. 13, at pp. 19 and 20.

I do not read the case of *Cranch v. Brooklyn Heights R.W. Co.*, 107 N.Y. App. Div. 341, relied upon by Mr. Denton, as affording assistance. The questions of the defendants maintaining a station where the accident happened, the custom of stopping their trains at a point where, had the train stopped that injured the plaintiff, no accident would have happened, make the facts entirely dissimilar: see also *Allen v. North Metropolitan Tramways Co.*, 4 Times L.R. 561, where upon facts a good deal like the *Cranch Case* the Court of Appeal upheld a nonsuit.

It is needless to travel through more of the cases upon this subject. It is apparent that in the development of the plaintiff's case it became clear that there were no facts in dispute upon which negligence of the plaintiff turned. No witness placed his case upon any higher ground than placed by himself, and his was the controlling evidence. It does not appear that the motor-man could, after he saw or should have seen the plaintiff's position of peril, have taken any step to avoid the accident. It is very difficult, upon the plaintiff's statement, to understand, if he were in possession of all his faculties, why this unfortunate accident happened. He came in contact with the car at an angle; it necessarily, at that hour of the night, in a deserted street, at a speed of eighteen miles an hour, must have been making a great noise; had he been paying any attention whatever he must have heard and seen, before the moment of impact, that the car was not stopping, and he was struck at about the point on the street where the car would have stopped had the plaintiff's expectations been realized.

I have no hesitation whatever in arriving at the conclusion that the plaintiff should have been nonsuited.

See next case.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

ONTARIO.]

[COURT OF APPEAL.

TINSLEY v. TORONTO R.W. Co.

(17 O.L.R. 74.)

Street Railways—Injury to Person Crossing in Front of Car—Omission to Stop at Usual Stopping Place, when Signalled—Negligence—Contributory Negligence—Nonsuit.

The plaintiff intending to take a street car going westerly, on arriving, shortly after midnight, at the southerly side of the street on which the particular car line was, saw a car coming westerly very rapidly, being then about 300 feet off. He saw two persons standing at the corner signal the car to stop, and believing that it would do so, it being the usual and customary practice to stop at the corner, when persons wished to get on or off the car, he, without again looking to see where the car was, attempted to cross in front of it, so as to get on it, when, instead of stopping, it ran past the corner, knocked down the plaintiff and injured him:—

Held, that it could not be said that there was inexcusable negligence on the plaintiff's part in attempting to cross the street in front of the car, for he might reasonably assume that the car would stop at the corner in pursuance of the signal to do so, and that the case therefore could not have been withdrawn from the jury; and was properly submitted to them.

Judgment of the Divisional Court (1907), 15 O.L.R. 438, reversed.

THIS was an appeal by the plaintiff from the judgment of a Divisional Court, setting aside the judgment entered at the trial in his favour for \$800.

The facts, with the exception of what took place with regard to the plaintiff seeing the signal made to stop the car, are set out in the judgments of the Divisional Court, reported in 15 O.L.R. 438.

On May 4th, 1908, the appeal was heard before Moss, C.J.O., OSLER, GARROW and MACLAREN, JJA., and RIDDELL, J.

J. H. Denton, for the appellant. There was ample evidence of negligence on the part of the respondents to go to the jury. Then as to the question of contributory negligence on the plaintiff's part, the evidence shews that the plaintiff saw the signal made by Mr. Sheppard to stop the car, and therefore he had reasonable ground for supposing that the car would stop at that corner, and that he could cross the street in safety. The evidence, on this point, was not properly taken down; but it is apparent from what took place between the learned Judge and

the defendants' counsel in discussing the question of nonsuit, and from the learned trial Judge's charge to the jury that the plaintiff said he saw the signal. The Divisional Court misconceived the effect of this evidence. In *Toronto R.W. Co. v. King*, [1908] A. C. 260, in the Privy Council, the decision was based on the ground that the driver of the waggon might reasonably assume that the company would observe its rules, and the doctrine thus laid down applies here. In the court below the respondents attempted to set up that there was no rule requiring the car to stop at the crossing during the night-time; but the evidence is to the contrary, for it is the duty of those in charge of the car to stop at specified cross streets, where there are persons to get on or off the car, and this is one of such streets. There is also the evidence of the motorman being intoxicated and running at too great a rate of speed, so that the car was not under proper control. Even if there was any evidence of negligence on the part of the plaintiff, this is immaterial, because the accident would have been avoided but for the negligence of the respondents.

D. L. McCarthy, K.C., for the respondents. The nonsuit entered by the Divisional Court was the only conclusion that could be come to on the evidence; the plaintiff admits that he saw the car before he reached the curb of the street, the track being thirty feet to the north of it, and that he had a clear view easterly on College street, the street being well lighted, the car being about 150 yards off, approaching at considerable speed; and he states that, although knowing that the car was so approaching at a great rate of speed, he never again looked to see where it was. Had the plaintiff turned his head or glanced in the direction of the car, he would have seen that it was utterly impossible to cross in front of it in safety, and that the accident would have been avoided. The case of *Toronto R.W. Co. v. King*, in the Privy Council, does not help the plaintiff. In that case the motorman turned off the power, and it was held that the driver of the waggon might reasonably have assumed that the car was going to stop; the negligence consisted in

again turning on the power, and thus causing the collision. The rule as to stopping at street corners only applies to day cars; there is no rule requiring night cars to stop. The judgment of the Divisional Court should not, under the circumstances, be interfered with.

The additional arguments, and cases referred to by the counsel, are mentioned in the judgments of the Divisional Court.

June 19, 1908. Moss, C.J.O.:—The action is to recover damages from the defendants for injuries to the plaintiff caused by his being struck by one of the defendants' cars on the College street route in the early morning of the 1st of January, 1907, through, as he alleges, the negligence of the defendants.

It is not disputed that the plaintiff was struck by the car or that he was seriously injured. But the defendants, under the statutory plea of not guilty, contended that the accident was not due to any negligence on their part, but was the result of inexcusable carelessness or recklessness on the part of the plaintiff occasioning the injury; or in any case that he was guilty of contributory negligence.

The circumstances relating to the accident and the evidence at the trial have in the main been developed sufficiently in the trial Judge's charge and the opinions of the Judges of the Divisional Court, and need not be repeated.

The learned trial Judge was of opinion that there was evidence of negligence on the part of the defendants proper to be submitted to the jury. He refused to withdraw the case from them, and in a charge not open to reasonable objection submitted to them questions, which, with the answers, are as follows, as appears from the original paper attached to the record:—

"1. Q. Were the defendants guilty of negligence which occasioned the accident to the plaintiff? A. Yes.

"2. Q. If so, what was that negligence? A. For not stopping when signalled; by not having car under control when approaching crossing.

"3. Q. Was the plaintiff negligent, and did his own negligent conduct cause the accident? A. No.

"4. Q. Damages? A. \$800."

Upon these findings there could be but one judgment, and the only question was whether for any reason the case should have been withdrawn from the jury.

In the Divisional Court the learned Chancellor, and Mabee, J., were of opinion that the learned trial Judge should not have submitted the case to the jury. Magee, J., was of the contrary opinion, and I agree with his conclusion and the reasons for it which he has fully set forth in his judgment.

It seems to me, with deference to the majority of the Divisional Court, that their apparent understanding of the evidence was that the plaintiff did not swear that he saw a signal to stop the car given by the witness Sheppard, and that this view greatly influenced their opinion.

But it is quite plain from the plaintiff's cross-examination, the discussion between the learned Judge and counsel for the defendants upon the motion to dismiss the action at the close of the plaintiff's case, and the reference to the incident in the learned Judge's charge which was allowed to pass without objection by defendants' counsel, that during his examination-in-chief the plaintiff must have made a statement that he saw Sheppard hold up his hand as a signal, but in some way the statement was omitted from the stenographer's notes. No doubt the jury heard it, and it was for them to judge of its weight in the light of the cross-examination.

But it was important to be borne in mind, when considering whether or not the case should have been withdrawn on the ground that it manifestly appeared that the plaintiff acted without any care or caution and recklessly incurred the danger, or on the ground that the facts proved could only lead to the one inference of carelessness and recklessness on the plaintiff's part.

And in my opinion that fact, together with others which Magee, J., has pointed out, put it out of the question for the learned trial Judge to pronounce as a matter of law that it was inexcusable negligence for the plaintiff to conclude that the car would stop at a corner at which it is the usual and regular custom to stop the cars when signalled for the purpose of taking up passengers or allowing them to alight, and to act upon that belief.

We have been invited to follow the rule adopted by the Courts of some of the United States, sometimes called the Pennsylvania rule. But the Courts of other States have declined to follow the Pennsylvania Courts, and I do not know of any decision, English or Canadian, which has laid it down as the rule of decision here.

Counsel scarcely contended that there was not evidence to support the findings of negligence against the defendants. Having found against the defendants on that inquiry, it then became a question for the jury to answer whether under the circumstances the plaintiff was negligent, or had so negligently acted as to have himself occasioned the accident.

Upon that they might have found either way, and having found for the plaintiff, that finding should not have been set aside unless there was no evidence upon which they could reasonably come to that conclusion. I refer to *Peart v. Grand Trunk R.W. Co.* (1886), 10 O.L.R. 753 (Appendix I.), and the judgment of the Judicial Committee in *Toronto R.W. Co. v. King*, *supra*.

I think the appeal should be allowed and the judgment entered at the trial restored, with costs throughout.

OSLER, J.A.:—I concur, though I must say with reluctance, in the result. There seems to be evidence, not very much, but still evidence which could not have been withdrawn from the jury, that the car might have been expected by plaintiff to stop as it approached the entrance to the park on the north side of College street nearly opposite University street. This it did not do, and the plaintiff, attempting to cross College street at a point it would not have reached had it stopped, was struck by it and injured. The jury found that the defendants were negligent, and they have been able to absolve the plaintiff from contributory negligence. How they could have done that with any regard to the evidence of the surroundings I cannot understand, nor (there being evidence on the subject which could not have been withdrawn from them) am I called upon to try to do so. Their verdict is one of those which discredits trial by jury in this class of cases. Were I untrammelled by the favourite formula, I would feel no hesitation in dismissing

the appeal, and refusing to restore a verdict which I regard as an unjust one.

RIDDELL, J.:—The facts—as distinguished from inferences from facts—are to my mind fairly set out in the judgment of the Chancellor, with one important exception now to be mentioned. The Chancellor says that the plaintiff “does not say that he saw any signal given by the other” (Sheppard).

This seems to be clearly an error. The reporter’s notes do not indeed show that the plaintiff in the examination-in-chief swore that he had seen Sheppard give a signal to the motorman to stop; but counsel for the defendants must have heard some such evidence, because we find in cross-examination the following. After speaking of facts having been brought to the recollection of the plaintiff by suggestion of others, the cross-examination proceeds:—

“Q. When did the suggestion come that you saw Mr. Sheppard hold up his hand, because you did not know that the other day?
A. If I didn’t know it, I think I said it to you the other day.

“Q. I don’t think you did. A. I think I did.

“Q. It has been taken down what you said to me the other day, and you did not say that. When did that suggestion come?
A. It would be previous to the time I seen you, anyway.

“Q. Was that the suggestion of your sister? A. No, I don’t think so; I don’t think she told me that.

“Q. Did anyone tell you that, because you did not know it the other day? A. Not that I can remember.

“Q. So you are not prepared to say whether someone suggested that to you or not; is that right? A. Yes, that is right.”

Then, on the motion for nonsuit:—

“His Lordship: The whole question seems to me to narrow down to this, whether it must be taken as negligence on the part of the plaintiff to assume that when a car is approaching a place where it usually stops, and where according to this evidence he saw a person signalling it to stop, whether in the face of that it is negligence to go on while the car is in motion.

“*Mr. McCarthy:* Of course, in regard to the signalling, the

plaintiff, as I pointed out, never made the suggestion of any signalling at all in his examination for discovery. The signalling is an entirely new suggestion, and certainly comes, as he says, from the suggestion of the other side. He cannot recollect as an act of memory that he ever saw the signalling.

There was nothing to indicate to the plaintiff that the motorman saw Sheppard, and he is not justified in assuming that and putting himself in a place of danger, because, according to Sheppard, the car had not slacked in any way.

"His Lordship: Surely a man who is on the opposite side of the street, hurrying along and seeing a person signalling at the corner, has a right to assume that the car will stop there."

And in the learned trial Judge's charge to the jury he says, without objection taken: "His [i.e. the plaintiff's] excuse for that practically is that there was no need of looking, because he knew that it was the duty of the car to stop at that corner; it was light; there was an arc light near by; everything was in plain sight; he saw the man and woman at the other corner; he saw the man signal for the car, and knowing it was the duty of the car to slow up or stop at that corner and to take on a passenger if there were any passengers to be taken on, he assumed that the car would stop, and assuming that it would stop he thought he could cross in safety. Now, was that a reasonable thing for a man to do under the circumstances in which the plaintiff was on that morning?"

I think it clear that the plaintiff did say in substance at the trial that he had seen Sheppard raise his hand and signal the motorman. The weight of this evidence is of course for the jury.

Then, as I understand the facts, the plaintiff, going north on the east side of University street, saw, before he himself arrived at College street, a car of the defendants, well lighted, and travelling at a rapid rate west, and therefore toward him; he also before leaving the curb on the south side of College street saw at the north-east corner of College street and the avenue two persons—a man and a woman—standing; he saw the man signal to the motorman to stop; he then, without further care, himself

left the curb, walked in a north-north-west direction to cross the street, and was struck by the car.

I agree in the law as laid down in many of the cases cited by Mr. McCarthy, and I do not know of any collection of cases more impressive than that made by a former Chief Justice of Canada (when Mr. Justice Taschereau), in *Grand Trunk R.W. Co. v. Beckett* (1887), Cameron's S.C. Cas., 228, at pp. 230 *seq.* I agree that "a railway is in itself a warning of danger to those about to go upon it, and cautions them to see whether a train is coming." "Passengers crossing the rails are bound to exercise ordinary and reasonable care for their own safety, and to look this way and that to see if danger is to be apprehended. . . If a railway train which ought to whistle when passing through a station, were to pass through without whistling, and a man were in broad daylight, and without anything either in the structure of the line or otherwise, to obstruct his view, to cross in front of the advancing train and be killed . . . the Judge ought to tell the jury that it was the folly and recklessness of the man and not the carelessness of the company which caused his death. . . The Legislature gave the defendants the right to run their trains, and . . . cast the duty upon those who cross their track not to rush in the way of their trains."

No doubt also "the general rule as to the necessity of persons crossing a railway track or street car track looking both ways to see whether they can safely cross is a most salutary and proper one:" *per* Sir Louis Davies, J., in *Grand Trunk R.W. Co. v. Hainer* (1905), 36 S.C.R. 180, at p. 186.

But all these general statements must be applied with care to the particular facts of the case. Here we have a man who knew, as all people in Toronto know, that the cars stop on the near side of the street to pick up passengers; that the cars stop at the signal of an intending passenger. I do not think that a knowledge can be imputed to him of the provisions of the rules of the company as to stopping, and in that regard I adopt the reasoning of Nesbitt, J., in the *Hainer* case, at pp. 193, 194. But the common knowledge he had which we all have. Having seen the signal given

which in the usual course of events results in the stopping of the car, can it be said that he was negligent as a matter of law in believing that the car would stop and in acting in that belief?

No doubt there are many American decisions which go the full length contended for, and there are dicta in the English Courts and our own which come near to the same result; but I do not find any case binding upon us which requires us to hold as contended for by the respondents. And irrespectively of the *King* case in the Privy Council decided the other day, I do not think that we could so hold. But the *King* case, it seems to me, is quite conclusive. In that case the deceased, driving east along Adelaide street, was struck by a car coming north on Yonge street. In the judgment of the Judicial Committee delivered by Lord Atkinson the following occurs at p. 269: "Their Lordships are further of opinion that the deceased, in attempting to cross in front of the tramcar, as the driver of the latter in the above quoted passage says he did (the man unfortunately cannot speak for himself), was not clearly guilty of the 'folly and recklessness' causing his death which Lord Cairns, in his judgment in the *Dublin, Wicklow and Wexford R.W. Co. v. Slattery* (1878), 3 App. Cas. 1155, at p. 1166, refers to as sufficient to entitle the defendants to a direction. It is suggested that the deceased must have seen, or ought to have seen, the tramcar, and had no right to assume it would have been slowed down, or that its driver would have ascertained that there was no traffic with which it might come in contact before he proceeded to apply his power and cross the thoroughfare. But why not assume these things? It was the driver's duty to do them all, and traffic in the streets would be impossible if the driver of each vehicle did not proceed more or less upon the assumption that the drivers of all the other vehicles will do what it is their duty to do, namely, observe the rules regulating the traffic of the streets. To cross in front of an approaching train, as was done by the deceased in *Slattery's* case, is one thing; to cross in front of a tramcar bound to be driven under regulations such as those above quoted, at such a place as the junction of these two streets, is quite another thing."

So the argument here is that the plaintiff saw the car "and had no right to assume" that the motorman would see Sheppard and stop. "But," one asks in the language of the Judicial Committee, "why not assume these things? It was the driver's duty to do them all."

And if the driver of the wagon in the *King* case had the right to assume that the motorman would do his duty and stop, I cannot understand why the plaintiff in the present case could not do the same thing. If he might so assume, it must be, as in the *King* case, a question for the jury to say whether his conduct based upon such an assumption was negligent.

No question was raised before us as to the propriety of the finding of the jury upon the negligence of the defendants; nor upon the evidence can there be.

I am of opinion that the appeal should be allowed and the judgment of the trial Judge restored with costs throughout.

GARROW and MACLAREN, JJ.A., concurred.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

ONTARIO.]

[COURT OF APPEAL.

BRENNER v. TORONTO R.W. Co.

(15 O.L.R. 195.)

New trial—Misdirection—Charge to jury—Objection at trial.

Appeal allowed from the judgment of the Divisional Court, reported 13 O.L.R. 423, granting a new trial.

Per OSLER, J.A.:—There is no hard and fast rule which absolutely prohibits the Court from entertaining an objection on the ground of misdirection when the party has omitted to take it at the trial.

THIS was an appeal from the judgment of a Divisional Court, reported 13 O.L.R. 423, which was argued on the 23rd and 29th of May, 1907, before Moss, C.J.O., Osler, Garrow, Maclaren and Meredith, J.J.A.

D. L. McCarthy, for the appeal.

W. R. Smyth and *S. King*, contra.

October 4, 1907. Moss, C.J.O.:—The facts, the findings of the jury, and the grounds upon which the plaintiff sought and succeeded in obtaining a new trial in this case, are fully set forth in the judgments delivered in the Divisional Court, reported in 13 O.L.R. 423.

Upon the jury's answers to the questions there could be no other judgment than that entered by the learned trial Judge, *i.e.*, a judgment dismissing the action.

Upon appeal to the Divisional Court many complaints against the Judge's charge and the jury's findings were urged on behalf of the plaintiff, but in the opinion of that Court the only one which was entitled to prevail was an objection to the charge on the ground of misdirection.

The point taken in the Divisional Court was that, in dealing with the fifth question, which involved a charge that the motor-man was negligent in maintaining too great a rate of speed in approaching University Street, and in failing to have the car under proper control at that point, which would have enabled him to avoid the accident after the plaintiff's danger became

apparent, the learned Judge failed to direct the jury to take into consideration the defendants' rule No. 58 instructing motormen that in approaching crossings and crowded places where there is a possibility of accident the speed must be reduced and the car got carefully under control. The Divisional Court held that there was misdirection in this respect; that in effect there was a withdrawal from the jury of evidence which they should have been permitted, if not directed, to consider.

The question is whether this conclusion, which lies at the bottom of the decision of the Court that a new trial be had between the parties, is correct. Everything turns upon this, for if the jury were in fact prevented from considering the rules, the plaintiff is entitled to argue that, but for such prevention the answers to the first and fifth questions might have been different.

It is well settled, that in an action like the present, rules of the kind shewn in evidence here are evidence proper to be submitted to a jury on the question of the reasonableness of the speed of the car and of the conduct of the motorman in charge. Has it been made out that the learned trial Judge disregarded the law in this respect?

I am unable to come to that conclusion. It is for the plaintiff to demonstrate that the jury were or may have been misled by the charge into supposing that they were not to regard the rules as part of the evidence that they were to consider.

The rules were admitted in evidence and were undoubtedly before the jury as part of the case during the progress of the trial. The learned trial Judge in his charge dealt exhaustively with the whole case, going carefully into the details of the evidence and pointing out the law.

And it is clearly apparent, that he had not in his mind the intention of leading the jury to suppose that the rules were not evidence or that they were to put them out of their consideration. This is shewn, for example, by his references to the rules when dealing with the sounding of the gong.

Objection is made that the learned Judge, when requested by counsel for the plaintiff, declined to direct the jury that they

were to take into consideration the rule already referred to. Objection in this form was not taken at the conclusion of the charge; nor was the learned Judge directly asked to direct the jury in that way. What passed between counsel and the learned Judge was, that at the conclusion of the charge and before the jury retired, counsel for the plaintiff asked him to charge the jury, that in addition to the original negligence he had spoken of, there was evidence from the motorman that he had not the car under control according to the proper method of running as given by the witnesses for the defence. Counsel referred to the evidence of certain witnesses as to the proper way to run the car when approaching the corner by slackening the speed. He made no mention of the rule or reference to it, but the learned Judge evidently had it in his mind, for, addressing the jury, he told them that it was not a question of the motorman's duty under the rule, it was a question what was reasonable for him to do. He then went on to explain that the motorman might break the rule four hundred times a day, but the question was whether he had acted reasonably under the particular circumstances of the case. After some further discussion he again addressed the jury and told them that under the rules and practice of the defendant company, it was the duty of the motorman to throw off the power ordinarily before approaching a corner so as to be ready to get the car under control and more readily to have it under control, but the question was, was he going at such a speed as was excessive. He added: "It is not a question of what the rule was, but was he acting improperly in going at an excessive speed at the time." So far, therefore, was he removed from any intention to withdraw the rule from their consideration, that he specially directed their attention to it, at the same time very properly telling them, that the question whether he had broken the rule was not the question they were to decide, but what they were to decide was, whether supposing he had ignored the rule he nevertheless had the car under proper control and was not going at an excessive speed. I am unable to say that in this there was misdirection, or anything which was calculated to create an im-

pression in the minds of the jury that in considering that question they were to put the rules aside and have no regard to the directions contained in them.

In order to obtain a correct notion of the impression likely to have been produced upon the minds of the jury, the charge should be looked at as a whole, and viewed in that way it appears to me that it is not at all likely that the jury in this case fell into the error of supposing that the learned Judge intended them to understand that they were not to consider the rules. Great weight was attached to the remark, said to have been made by the learned Judge after the jury had retired, to the effect that he had told them that the rules of the company had nothing to do with it. There must have been some misunderstanding with regard to this, for nowhere in the printed charge are there to be found any expressions that could be construed into such a statement to the jury, and it is clearly at variance with what he did tell the jury. It seems clear, from the objection which drew forth the remark, that counsel for the defendants understood the charge to have comprehended the rules, as well as the other evidence bearing on the question of the reasonableness of the motorman's action. That plaintiff's counsel held the same opinion seems to be shewn by the fact that he made no objection in terms to the alleged withdrawal of the rules.

I mention this not as indicating an opinion that failure to raise an objection should be treated in every case as an absolute bar to relief on that ground, but merely as shewing that at the time counsel did not gather the impression which it is now argued the charge may have conveyed to the minds of the jury.

I do not think that there was any miscarriage or that any grounds for a new trial have been shewn.

The appeal should be allowed and the judgment at the trial restored.

OSLER, J.A.:—I agree in the result, being of opinion that there was no misdirection in the learned Judge's charge.

I only desire to add that in my opinion, there is no hard and

fast rule which absolutely prohibits the Court from entertaining an objection on the ground of misdirection when the party has omitted to take it at the trial. That is and ought to be the general rule, but misdirection sometimes results in a mistrial or in a failure to guide the jury in dealing with the essentials of the case, and when that happens and a substantial wrong or miscarriage is occasioned thereby, I have no doubt that the Court can and ought to interfere even though no objection was taken to the charge.

The appeal must be allowed with costs, if demanded.

MEREDITH, J.A.:—The one substantial question is, whether the plaintiffs were entitled to a new trial on the ground of misdirection.

If there were such misdirection, the plaintiffs are entitled to a new trial generally: it affected the whole question of negligence, and might plainly affect all the findings of the jury upon that question, so that nothing is gained by discussing any question of negligence at the last moment, or negligence at any earlier stage; a question which does not now arise, and one which may never arise, in this case, so far as any Court of Appeal is concerned.

In order to *entitle* a party to a new trial on the grounds of misdirection three things must exist: (1) it must be a material misdirection; (2) it must have been distinctly objected to at the trial; and (3) some substantial wrong or miscarriage must have been occasioned by it.

Each one of these essentials is wanting in this case: the first two being, the third must necessarily be, absent.

The contention, to which the Divisional Court gave effect, was that the trial Judge withdrew from the consideration of the jury the working rules of the defendants, made for the guidance of their servants, proved at the trial; that he told the jury that the defendants' rules had nothing to do with the case.

But he told them nothing of the sort. There is no sort of ground for contending that he did. The only excuse for it is to be found in the remark to that effect which appears in the short-

hand report of the trial. But that remark, if really ever made, was not made in the presence of the jury, and obviously, could not have had any sort of effect upon them. I would have supposed it to have been erroneously reported; but, if not, it must have been but an innocuous slip of the tongue, not to be wondered at, perhaps, after the exceeding patient and accommodating manner in which very many and very long requests to charge the jury further upon many subjects, in the way the plaintiff desired that they should be charged, had been permitted to be made in the presence of the jury, the result of which was, that their counsel had, for all practical purposes, another opportunity of presenting his arguments to the jury, and so the last word with them.

That there is no sort of ground for this contention is apparent on all hands. It would be a stultification of the act of the Court in permitting evidence to be given of such rules, evidence which took up considerable time, and to which no one objected in any manner; but which was given and received as if it were just as material as any other part of the plaintiff's case.

In one part of the charge the very opposite of what is contended for was clearly and distinctly put in these words: "Therefore it was his duty to sound his gong at University Street. It is recognized by the rules of the company as being the proper thing for the motorman to do. It is therefore, not too much to say, that that course, being recognized as reasonable by the company, should be recognized as reasonable by the public, and that they should expect it to be followed." What possible ground of objection, by the plaintiffs, can there be to such a statement as to the materiality and effect of the plaintiff's rules? Surely, if there be any objection to it, it is not on their part. But it is said that the learned Judge was then discussing the question of the sounding of the gong? But, what possible difference can that make, for he was dealing with one of the rules of the defendants, all of which are in this respect upon the same footing, and were proved in the same manner, and at the same time.

During the very long discussion, carried on by the plaintiff's

counsel with the learned Judge, immediately after he had finished his charge, the following observation was made by him: "It is not a question, gentlemen of the jury, as to the motorman's duty under the rule, it is a question of what is reasonable for him to do." Again, what objection can justly be made to this? Should the learned Judge have said, "It is not a question whether the motorman acted reasonably; the question is, did he obey the rule?" Supposing the rules had been in the defendants' favour, and they were endeavouring to avoid liability for negligence because the motorman had done all that the rules required of him, would the plaintiffs think the charge, that obedience to or disobedience of the rules was not the question which the jury had to try, but that that question was, whether reasonable care was taken, was very erroneous? There is nothing whatever that took place in the presence of the jury, from first to last, throughout the trial, that detracts in any manner from these observations as to the effect of the rules, nor anything in any manner withdrawing them as evidence—the same as all the rest of the evidence adduced—from the consideration of the jury. There was, therefore, no misdirection, such as the plaintiffs contend for.

In these circumstances, it is not to be wondered at that there was no sort of objection to the Judge's charge in this respect; it would indeed be rather surprising, if there had been, on the plaintiffs' part. Search as one may throughout the very many requests, objections and observations of the plaintiffs' counsel, nothing of the sort can be found, though it was clearly not a case of omitting anything which might have been said, or of saying too little.

In regard to the charge generally, it may, I think, be safely said, that if all charges afforded as much evidence of painstaking and accuracy, there would be very little to be reasonably found fault with; though it is certainly a mistake to allow another speech to be made in the presence of the jury in the guise of objections to the charge.

And, as I have said before, there being no misdirection, nor

any objection to the charge on the ground of misdirection, respecting the rules of the defendants, it is obvious, that there was no substantial wrong or miscarriage occasioned by any such misdirection.

It would be a thing very much to be regretted, if any of the Courts should drop into a loose practice of granting new trials. One trial should, generally speaking, be quite enough; and no encouragement should be given to any sort of loose manner of conducting a trial, by any of the parties to it, upon the notion, that anyway, if they are only careless enough, they can get another trial. The cost of a wasted trial is a serious matter; the injustice of giving a party a second chance, except for very substantial reasons, is manifest. Besides, it must always be remembered, that the jury have certain absolute rights, powers and duties, which the Court has no more right to invade or disregard, than the jury have to invade the province of the Court, or to disregard their proper instructions; and that, to grant a new trial, because the Court may not like the verdict, or upon any but substantial and established grounds, is really a disregard of the sole functions of the jury, and an invasion of their province. But, if the evidence were to be weighed, and the case re-tried, here, and notwithstanding the sympathy which one may, and indeed must, have for the plaintiffs in their great misfortune, can it be said, that the findings of the jury were not, even at the least, well warranted by the evidence? Can it be said, that the real cause of the accident was not the imprudent manner in which the female plaintiff attempted to cross the railway tracks? And, if the position of the parties were reversed, and the defendants were here seeking a new trial under quite similar circumstances and on the like grounds, can it be doubted, that the application would be summarily dismissed? Such a test is not always out of place.

I am quite unable to perceive how any sort of injustice, from a legal point of view, was done to the plaintiffs at the trial, or to find any good excuse for interfering with the verdict of the jury there rendered, or with the judgment directed by the trial

Judge to be entered thereupon, and would therefore allow this appeal.

GARROW and MACLAREN, JJ.A., concurred.

See next case.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

CANADA.]

[SUPREME COURT.

BRENNER V. TORONTO R.W. CO.

(40 S.C.R. 540.)

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Street railway—Rules of company—Charge of Judge—Contributory negligence.

A rule of the Toronto Ry. Co. provides that "when approaching crossings and crowded places where there is a possibility of accidents the speed must be reduced and the car kept carefully under control. Go very slowly over all curves, switches and intersections; never faster than three miles an hour . . ." A girl on the south side of Queen Street wished to cross to University Avenue which reaches but does not cross Queen. She saw a car coming along the latter street from the east and thought she had time to cross, but was struck and severely injured. On the trial of an action for damages the Judge in his charge said: "It is not a question, gentlemen of the jury, as to the motorman's duty under the rule, it is a question of what is reasonable for him to do." The jury found that defendants were not guilty of negligence; that plaintiff by the exercise of reasonable care could have avoided the injury; and that she failed to exercise such care by not taking proper precautions before crossing. The action was dismissed at the trial; a Divisional Court ordered a new trial on the ground that the Judge had misdirected the jury in withdrawing from their consideration the rules of the company; the Court of Appeal restored the judgment at the trial. *Held*, affirming the judgment of the Court of Appeal, 15 O.L.R. 195, which set aside the order of the Divisional Court for a new trial, 13 O.L.R. 423, Idington, J., dissenting, that the action was properly dismissed.

Held, per Girouard and Duff, JJ.—The Judge's charge was open to objection but as under the findings of the jury and the evidence plaintiff could not possibly recover a new trial should be refused.

Per Davies, J.—There was no misdirection. The jury were not led to believe that the rules were not to be considered, but only that they should not be the standard as to what was or was not negligence, which question should be decided on the facts proved.

Per MacLennan, J.—The place at which the accident occurred, where University Ave. meets Queen Street, is not a crossing nor intersection within the meaning of the rules and they do not apply in this case.

PRESENT:—Girouard, Davies, Idington, MacLennan and Duff JJ.

APPEAL from a decision of the Court of Appeal for Ontario, 15 O.L.R. 195, reversing the order of the Divisional Court for a new trial, 13 O.L.R. 423, and restoring the judgment at the trial by which the action was dismissed.

The material facts of the case are stated in the above head-note.

G. F. Henderson, K.C., for the appellants.

D. L. McCarthy, K.C., for the respondents.

The appeal was heard on June 2nd and 3rd, 1908.

October 6, 1908. GIROUARD, J.:—I concur in the opinion of Mr. Justice Duff.

DAVIES, J.:—The findings of the jury in this case are all against the plaintiff. They negative negligence on the part of the company and its motorman and they find that the plaintiff could by the exercise of reasonable care have avoided the injuries she sustained and that she neglected to take precautions in crossing the road. The trial Judge on these findings entered judgment for the defendant. The Divisional Court on appeal, thinking there had been misdirection in the charge to the jury in having withdrawn from their consideration the rules of the defendant company, directed a new trial. On appeal to the Court of Appeal the judgment was unanimously reversed and the judgment entered by the trial Judge restored.

I have read and re-read the Judge's charge most carefully and have reached the conclusion that as a whole it was a painstaking and careful summing up of the facts and is not open to the charge of misdirection. I do not think the jury were misled into the belief that they were to banish these rules from their minds. What they were told was that they should not accept these rules as their standard or guide as to what was or was not negligence but should decide that question upon the facts as proved before them.

The crucial question was whether or not the motorman had his car under control at the time or was going at an improper rate of speed.

The learned Judge charged: "It is not a question, gentlemen of the jury, as to the motorman's duty under the rule, it is a question of what is reasonable for him to do." That again is another way of saying the rules are not the standard to guide you to your conclusion as to the speed of the car or its control, but the determination of what was reasonable under the circumstances as proved. He may have obeyed the rule and still have been guilty of negligence. He may again have disobeyed the rule under circumstances and conditions which did not make him so guilty. The question was whether or not, under the proved facts, negligence on his part was shewn. I think this was the substance of his charge and I think it was right in law and was properly understood by the jury.

I agree with the Court of Appeal and would dismiss the appeal.

IDDINGTON, J.:—This is an accident case in which the motorman of respondent company ran down the appellant, a young woman whom he saw from the time she stepped off the south sidewalk on Queen Street to cross to the north side of that street in order to reach University Street or University Avenue running at right angles to the north side of Queen Street, until she was hit by the fender of the car he was driving with such force that she was tossed to one side and run over.

It so happened that she, in order to avoid a car running in a contrary direction to that of the one in question, had walked past the line of the point of junction of these streets and therefore had to cross so obliquely to reach her destination that her back was turned towards the motorman who saw her.

She says she had seen the car coming and had supposed she could have reached her destination on the north side of the track before the car in question, travelling at an ordinary rate, would overtake her.

She evidently miscalculated, and I am not going to pass any opinion upon whether that miscalculation was negligence or not when coupled with her failure to keep an eye on the moving car.

The only point in the case for present consideration is whether or not the motorman was negligent and whether or not the learned trial Judge properly directed the jury in this regard.

One of the rules of the company for guidance of conductors and motormen is as follows:—

“Rule 58. Curves and Crossings—When approaching crossings and crowded places where there is a possibility of accidents, the speed must be reduced and the car kept carefully under control.

“Go very slowly over all curves, switches and intersections; never faster than three miles an hour, and extra caution must be used in handling double truck cars at such places.

“An intersection must never be taken when another car is approaching.

“Cross streets must not be blocked nor must any crossing be taken until the road ahead is clear.”

The company called a witness named Whitehead who had been in their service for fourteen years as a motorman and previous to that had served in the same capacity in Cleveland.

He gave the results of his long experience and of his experience as an instructor of motormen for the company in the following evidence:—

“Q. In the special instructions to motormen on page 16 of the Rules, it says: ‘The moment any person, waggon or obstacle is seen to be in danger on the track, bring car under perfect control.’ Are you familiar with that? A. Yes.

“Q. And you drum that into your men when you are training them? A. All ever I can.

“Q. Then I notice Rule 55, ‘Reversing is a severe strain on the apparatus, especially when the car is under high speed, and should never be resorted to except when absolutely necessary.’ I suppose you also impress that on your men? A. Yes.

“Q. Not to resort to the reverse unless it is absolutely necessary? A. Yes.

“Q. Not till the last moment? A. Not until it is necessary.

"Q. And is not there a rule that you shut off the power on approaching a street? A. Yes, they are supposed at all cross streets to shut off the power and ring the gong.

"Q. How far? A. A reasonable distance; it depends on the speed you are travelling at.

"Q. You will have to tell me, you know; how far do you consider a reasonable distance? 'When approaching crossings and crowded places where there is a possibility of accidents, the speed must be reduced and the car kept carefully under control.' That is 58, do you impress that on your motormen? A. Yes.

"Q. Then at what distance from a crossing do you consider that a man should shut off his power and begin ringing his gong? A. It depends on the speed at which he is travelling.

"Q. Suppose he is travelling six miles an hour? A. He should shut off his power sixty, eighty or a hundred feet away from the street crossing.

"Q. And at ten miles an hour? A. A little sooner.

"Q. How much sooner? A. Not necessarily much sooner.

"Q. How much sooner? A. I could not tell you for a few yards, if a man knows when he has his car under control he knows what distance he can stop in.

"Q. I want an answer to that question. You say if a man is travelling at six miles an hour he should shut off his power from eighty to a hundred feet. Now if he is travelling at ten miles an hour when should he shut it off? You say a little sooner? A. Well, twenty or thirty feet.

* * * * *

"Mr. Smythe: Q. Now, I suppose we may put you down as a thoroughly competent efficient motorman, or you would not occupy the position you do occupy? A. I think so.

"Q. You know this car? A. Yes.

"Q. Would you advocate this car 736 running down Queen Street from York to University at a speed of fifteen miles an hour at nine o'clock in the evening? A. Well, I don't know; if all was clear, and there was nothing to obstruct me, and the car would run fifteen miles an hour, I might.

“Q. How far away from Osgoode Hall corner would you throw off your power and slacken the speed? A. I could not get to a speed of fifteen miles an hour going from York Street to University.

“Q. Assuming that you had your power on full where would you turn it off? A. A car is not always running at full speed when the power is on full.

“Q. If you had your power on full after leaving York Street where would you turn it off? A. I would shut it off forty or fifty feet back from the corner of University Street, or whatever you call it.

“Q. Is that your answer? A. Yes, sir.

“Q. That is what you are telling me now? A. Yes.

“Q. And you would not shut it off before? A. That would be quite enough to slow down, you are not supposed to stop unless it is necessary.

“Q. That is your answer now, is it? A. Yes.

“Q. If you saw a girl walking toward the track with her back toward you, would you consider it your duty to get your car under control and ring the gong? A. Yes.

* * * * *

“Mr. Smythe: Q. If a competent man were operating a car, and saw a girl approaching the track with her back towards him, at what distance should he get his car under control, it being obvious that she did not see him, at what distance from the girl should he get his car under control, running at a speed of, say six miles an hour? A. Well, he should get his car under control say within fifty or sixty feet of where the girl was.

“Q. Say he was running ten miles an hour at what distance from the girl should he get his car under control? A. Then he would want twenty-five feet more.

“Q. And at fifteen miles an hour? A. An equal ratio, about twenty-five feet more.

“Q. And that is what a careful, competent man should do? A. Yes.

“Q. Now, I understand you to say to my learned friend, that with the car under control, by the use of the reverse a car of this type could be brought to a dead stop in fifty feet? A. I said about fifty feet, running at six miles an hour.

* * * * *

“Q. Now, would a competent motorman who says he had applied the reverse a moment before or at the instant of striking a person in the street allow his car to be run 150 feet after that? A. I would naturally think he would stop his car as soon as he could.

“Q. Could he not stop it long before 150 feet? A. I should think, as I told you, about fifty feet.

“Q. And if it ran 150 feet? A. It might be a bad rail.

“Q. Would a competent motorman under those circumstances allow his car to run 150 feet? A. I have seen the rail when you could not stop in less than 150 feet, when the reverse bit the car would slide along the rail. A good deal depends on the rail.

“Q. We are speaking now of a moderate rail. Would a competent motorman who had applied his reverse at the moment of collision permit his car to run 150 feet after? A. I should not think so.

* * * * *

“Q. Then there is no such rule, Mr. Whitehead? A. I don't think so.

“Q. There is a rule that you have to throw off your power before approaching intersections? A. At intersections you have to stop.

“Mr. Smythe: My learned friend has insisted throughout that the instructions to motormen were not to be found in that book. This witness is an instructor, and I asked him if it was part of the instructions to throw the power off, and he said yes.

“The Witness: As a precaution.

* * * * *

“His Lordship: Q. Do I understand there are instructions

to motormen to stop at cross streets? A. Decidedly not, only at intersections of other tracks.

“Q. You did not mean to say at all cross streets? A. No, but a man naturally, as a precaution, shuts off the power when coming to a street, but he is not supposed to stop unless it is necessary.

“Mr. Smythe: Q. He has to shut the power off? A. Well, I do it at every cross street as a precaution.

“Q. Coming to every cross street you shut it off? A. I shut off my current.

“Mr. McCarthy: Q. For what purpose is that? A. Just as a precaution, in case of anything happening, not that I am expecting anything, but we never know what is coming.

“Q. Would you do that when approaching a crossing at five or six miles an hour? A. Yes, decidedly.

Mr. Smythe: Q. And much more so if you were approaching it at fifteen miles an hour? A. I would not approach a crossing at fifteen miles an hour, if I knew it.”

Another witness of the company corroborates a great deal of this.

The learned trial Judge in an exceedingly painstaking charge failed to direct the jury as to this evidence and its important bearing on the issue raised thereby of the negligence of the company.

It is true he spoke in general terms of the duty of the motor-man to have his car under control.

But what that meant or he intended to convey by it does not appear.

A great deal was said and no doubt in view of the complexity of the case properly said about the rate of speed the car had been going at between York Street and University Street.

But the relation between the speed, whatever it was, and the necessary steps to control that speed, and all else, when and where such throwing off the power as indicated had become necessary, according to the evidence above, was not, I submit,

referred to or direction given as to it. We have not a word directly bearing on it unless covered up in the phrase relative to having the car under control. Nay more, we have the following passage in the charge which shews all that was present to learned Judge's mind "up to the approach of the girl." He says:—

"Apart from the condition of the car, the excessive speed, and the not ringing of the gong there is no other allegation of negligence made against the defendant until the approach of the girl."

The approach of the girl part of the case relates to what the motorman did when the ringing of the gong failed.

He reversed, when within ten feet of the girl, after he had gone far past the point at which the above evidence indicates power ought to have been thrown off.

The needful elaborateness of the charge which had to deal with many issues raised besides the one I am dealing with, tended to obscure the one I now deal with, and the evidence on the point.

At the close of a charge of that character counsel for respondent objected as to this, and the learned Judge's remarks supplementing his main charge appear, in response to these objections as follows:—

"Mr. Smythe: Then I would ask your Lordship to charge the jury that in addition to the original negligence you spoke of, there was evidence from the motorman himself that he had not the car under control, according to the proper method of running as given by the witnesses for the defence themselves. Your Lordship will remember that the witnesses Whiteside and Cosgrove both said that the proper way to run the car was to turn off the power 100 feet east of Osgoode Hall corner, and the motorman himself says he did not turn off the power until immediately before the accident. They both also said that the proper way to run it was to get the car under control when approaching the corner, by slackening the speed. The motorman

says he did not put on the brake until he saw the girl would be run over.

“His Lordship: It is not a question, gentlemen of the jury, as to the motorman's duty under the rule, it is a question of what is reasonable for him to do. *He may break the rules four hundred times a day*, but the question is whether under the particular circumstances of the case he acted reasonably, just as any other man going on the road. You heard, however, what he said, that he sounded the gong before he got to the west fence of Osgoode Hall, and then you heard that he had not slowed down because he was not going at a speed which *he thought called for that*.

“Mr. Smythe: There was the evidence of the witness who said that he ought to have taken off the power.

* * * * *

“His Lordship (to the jury): It is said that ordinarily it would be the duty of the motorman to throw the power off before approaching the corner, so as to let the car roll, that he would then be in a better position to have the car under control, and, if necessary, to stop. Under the rules and under the practice of the company it is the duty of the motorman to throw off the power ordinarily, before approaching a corner, so as to be ready to get the car under control, and more readily to have it under control. *But the question is, was he going at such a speed as was excessive? It is not a question of what the rule was, but was he acting improperly in going at an excessive speed at the time?*

* * * * *

“Mr. Smythe: Then I would ask your Lordship to charge the jury that there was evidence that the motorman *should have had his car under control at an earlier period than the period when he had it under control*.

“His Lordship: I think I have already said that.”

This, I think, might well be taken by the jury as a withdrawal of the evidence in question.

It seems to me quite clear that the jury did so treat it.

It was uncontradicted evidence coming from a source the respondents could not question and did not question.

If regard were had to it at all I think it was impossible not to find negligence on the part of the company.

The motorman did not pretend he had observed the means this evidence points out as his duty, that is, by throwing off the power.

That the rules of the company and the experience of the company are not the law of the land is true. But what the experience of this and the like companies have discovered to be necessary as reasonable precaution in carrying on their business in the like conditions presented in any given case is evidence of the very highest value.

The remarks anent the reversing of power are all beside this question, for, as already remarked, that took place when within ten feet of the girl and a considerable distance beyond the street junction relative to approaching which, part of the evidence speaks.

Had the car been rolling along, with the power off from the point indicated it should have been, it would in all probability never have reached the girl. There possibly never would have been any collision or any need for the consideration of the alleged contributory negligence.

It is but a second of time that is involved in the inquiry.

And again, had the power been off and consequently, both the momentum of force propelling the car and the speed been reduced, the reversing operation, if it had ever become necessary, would have had more decided effect and probably avoided any collision. The jury should have had a fair chance to deal with all this.

In a sense the matter is, when analyzed, a question of speed, as the learned Judge truly said, but he did not make that analysis for the jury and shew the bearing of his remark if he intended it to have any such relation to the evidence in question. If the speed of the car had, for example, been only a snail sort of pace no need possibly for a throwing off of such power. But

it clearly was moving at so high a rate of speed that consideration directed to the point and the evidence upon it, was much needed in this connection.

The trial had proceeded on the particulars of negligence that dealt with excessive speed, but the evidence of the expert motor-man, Whitehead, as counsel for respondents frankly admits, was a surprise.

He had two alternatives before him on this disclosure of very unexpected evidence. One was to object to the evidence as not admissible within the specific particulars.

This he did not adopt.

Probably he wisely foresaw an amendment and that thereby increased prominence might be given the point.

The other alternative and which he adopted was to take his chances of war, and of the possible escape in the confusion that might ensue, seeing it was only other things that were specified as negligence, and this the gross act of negligence apparent on the evidence, as a whole, and which should have been made earlier apparent might come to be, as it was, overlooked.

Wisdom has its reward sometimes. But it cannot now be said, nor was it attempted on Mr. Smythe's objection or in argument here, to set up that this negligence was not pleaded. After treating it as fairly before the Court at the trial and afterwards, the issue thus raised is to be treated as if specified in the particulars.

It is not the case of any ultimate negligence that concerns me. That might have arisen for consideration or never have been reached.

I, in face of what, with the greatest regard, I conceive to be a serious error in the way of misdirecting the jury, cannot find any consolation or way of escape from a new trial in the finding of contributory negligence for if the primary negligence was found on the above evidence the really proximate cause of the collision the plaintiff's negligence could not be so.

The jury if properly directed in light of this evidence might never have reached the point of contributory negligence.

The motorman asserts he threw off the power when some distance past the street line, but being like much else in his evidence not very definite I need not for the present purpose deal with it. I mention it merely lest expressions used relative to the reversal of power might indicate I had overlooked it. I might guess it immediately preceded reversal.

Since writing the foregoing the report of the case of *Toronto Ry. Co. v. King*, [1908] A.C. 260, has come to hand and shews how very differently from this charge the Judicial Committee of the Privy Council dealt with the very rule in question here; though it was not there supplemented by evidence such as above and though the rule was unexplained or extended as by the said evidence given in this case and quoted above.

Another point of difference is that there the motorman never saw the man or cart his car struck at the crossing whereas here the motorman not only saw the girl in question, but describes her manner of carrying herself with great minuteness.

The judgment, in that case, I submit supports what I have written.

I think the appeal should be allowed with costs and the order of the Divisional Court for a new trial be restored.

MACLENNAN, J.:—I think the judgment appealed against in this case is right, and for the reasons given therefor by the learned Judges of the Court of Appeal.

The argument of the appellants' counsel appears to me to rest upon a misconstruction of the company's rule, No. 58. This rule is as follows:—

“Rule 58. Curves and Crossings—When approaching crossings and crowded places where there is a possibility of accidents, the speed must be reduced and the car kept carefully under control.

“Go very slowly over all curves, switches and intersections; never faster than three miles an hour, and extra caution must be used in handling double truck cars at such places.

“An intersection must never be taken when another car is approaching.

“Cross streets must not be blocked nor must any crossing be taken until the road ahead is clear.”

I am unable to agree with the opinion of the learned Judges of the Divisional Court, that the place where this accident occurred is either a crossing or an intersection within the fair meaning of this rule. There is no crossing and there is no intersection of any kind. University Avenue, and University Street, and the several paths and ways there meet Queen Street, but do no more. They do not cross it, nor intersect it. A vehicle or a pedestrian coming down University Avenue or Street may turn east or west upon Queen Street and go his way with perfect safety, without crossing either the rails of the company or the street. The citations from the dictionaries, in my opinion, are clearly against the interpretation of the Divisional Court.

Mr. Nix, the roadmaster of the company, called by plaintiff's counsel, at page 56, speaking of University Street, says it is not a cross street, that the rules for ringing the gong and having his car down to a low rate of speed apply to cross streets, and that an intersection is a cross street.

He further says that, as between a street which merely meets another and one which crosses it, the duty to slacken speed and sound the gong exists in the one case and not in the other, and, finally, that the company had a right to run past the place where the accident occurred without slackening speed.

The only seeming qualification of this is in the evidence of Whitehead, another roadmaster of the defendants, and called on their behalf. In cross-examination by the plaintiff's counsel he is being questioned as to the practice and duty of motormen when approaching crossings under rule 58, and the following questions were put and answers made:—

“Q. You know this car? A. Yes.

“Q. Would you advocate this car, 736, running down Queen

Street, from York to University, at a speed of fifteen miles an hour, at nine o'clock in the evening? A. Well, I don't know; if all was clear, and there was nothing to obstruct me, and the car would run fifteen miles an hour, I might.

"Q. How far from Osgoode Hall corner would you throw off your power and slacken your speed? A. I could not get to a speed of fifteen miles an hour going from York Street to University.

"Q. Assuming that you had your power on full where would you turn it off? A. A car is not always running at full speed when the power is on full.

"Q. If you had your power on full, after leaving York Street, where would you turn it off? A. I would shut it off forty or fifty feet back from the corner of University Street, or whatever you call it.

"Q. Is that your answer? A. Yes, sir.

"Q. That is what you are telling me now? A. Yes.

"Q. And you would not shut it off before? A. That would be quite enough to slow down, you are not supposed to stop unless it is necessary.

"Q. That is your answer now, is it? A. Yes."

Now, I do not think this evidence can be construed as a statement that University Street was a crossing or an intersection within rule 58, or a place where it was necessary to ring a gong or slacken speed, when approaching it. He is not asked that question, but only, at what point he would turn off power if he wanted to stop at University corner. That is, evidently, how he understood it, for he says he might, if all was clear and nothing to obstruct and the car would run so fast, from York to University Street, at fifteen miles an hour. And that you are not supposed to stop unless it is necessary.

I, therefore, think the fact that this place was where two streets met each other had no bearing upon the case at all. The motorman was approaching the place of accident just as if there had been no avenue or other street at that point, and the unfor-

tunate plaintiff was intending to cross just as she might have done at any other point not a crossing nor intersection.

Viewed in that way, as I think the case ought to be, I think there was no misdirection or non-direction of which the appellants can complain, and that the appeal fails.

DUFF, J.:—I agree that the learned Judge's instructions to the jury upon the appellants' contention that the motorman was negligent in not sooner bringing his car under his control is not satisfactory; but although, upon this head the appellant may have some cause of complaint, I cannot convince myself that, in view of the finding of the jury on the issue of the contributory negligence, she can be said to have suffered any substantial wrong entitling her to a new trial.

The contributory negligence charged against the appellant and found by the jury was that in crossing the street she attempted to pass in front of an approaching car without taking proper (that is to say, reasonable) precautions. The appellant being on the south side of Queen Street, wished to cross to the north side. As she left the curb she observed the car which ran her down (on the north track some distance to the eastward) heading in her direction; but assumed that she would have time to cross before it reached her line of march. On this assumption she proceeded to set foot on the track on which she knew the car was approaching, without again looking in the direction of it.

It was no doubt this last mentioned act—the act of going upon the track along which she knew a car was, within a short distance, approaching—without first looking to see the position of the car, that in the opinion of the jury constituted the contributory negligence they attributed to the appellant. Given this finding—that this act of the appellant (by which she passed from a position of perfect security into a position in which, in the circumstances of the moment, a collision with the respondents' car was inevitable) was an act of negligence—I am unable to see any ground on which she could hope to recover. The

principle is too firmly settled to admit, in this Court, any controversy upon it, that in an action of negligence, a plaintiff, whose want of care was a direct and effective contributory cause of the injury complained of, cannot recover, however clearly it may be established that, but for the defendant's earlier or concurrent negligence, this mishap, in which the injury was received, would not have occurred. *The London Street Railway Co. v. Brown*, 31 S.C.R. 642; *Spaight v. Tedcastle*, 6 App. Cas. 217, at page 226; *The "Bernina,"* 12 P.D. 58, at pages 88 and 89.

It was not argued that the question of the contributory negligence was not fairly left to the jury; as indeed it could not well be, since at the trial no objection was taken to the charge upon the head.

Appeal dismissed with costs.

Samuel King, for the appellants.

McCarthy, Osler, Hoskin & Harcourt, for the respondents.

STREET RAILWAY—REDUCED RATES.

ONTARIO.]

[COURT OF APPEAL.

IN RE TOWNSHIP OF SANDWICH EAST AND WINDSOR & TECUMSEH
ELECTRIC R.W. Co.

(16 O.L.R. 641.)

*Street Railways—By-law of Municipality—Passenger Fares—School Children—
Reduced Rates.*

Under a municipal by-law governing a street railway, it was provided that the ordinary cash fare should be 5 cents, children under five years of age, not occupying a seat and accompanied by its parent, to be carried free; and for every child under twelve years of age, except as aforesaid, the fare should not exceed 3 cents. Tickets were to be issued and sold at the following rates: Ordinary tickets, six for 25 cents, each ticket to be taken for an ordinary 5 cent cash fare; children's and school children's tickets, ten for 25 cents, each ticket to be taken for a 3-cent fare, as above provided; working-men's special tickets, eight for 25 cents, to be taken for a 5-cent fare:—

Held, reversing the order of the Ontario Railway and Municipal Board, that the children entitled to school children's tickets were those under the age of twelve years, and not those under twenty-one, even though the latter were actually attending school.

THIS was an appeal by the railway company from an order of the Ontario Railway and Municipal Board, under sec. 43 of the Ontario Municipal and Railway Board Act, 1906, 6 Edw. VII. ch. 31.

The order of the Board directed "that any person under twenty-one years of age, actually attending school, upon the production of a certificate from his or her principal teacher that he or she is a *bonâ-fide* school child attending school, shall be entitled to purchase at any office where such tickets are sold or upon cars of the respondent's company, ten tickets for twenty-five cents, such tickets to be taken in payment as fare between each of the divisions mentioned in the first paragraph of sub-sec. (c) of sec. 15 of by-law No. 384 of the township of Sandwich East, as set forth in schedule A, ch. 111, of 5 Edw. VII., 1905.

The contention of the railway company was that only children under the age of twelve years were entitled to ten tickets for twenty-five cents.

The facts, so far as material, are set out in the judgment of RIDDELL, J.

The appeal was heard on May 4, 1908, before Moss, C.J.O. OSLER, GARROW and MACLAREN, JJ.A., and RIDDELL, J.

A. H. Clarke, K.C., for the appellants.

J. H. Rodd, for the respondents.

The arguments sufficiently appear from the judgments.

June 19, 1908. OSLER, J.A.:—This was an appeal by the railway company from an order of the Railway and Municipal Board placing a construction upon a by-law of the township which provided for the terms upon which the company should be permitted to construct and operate an electric street railway upon certain highways of the township.

The order was made by the two lay members of the Board. No written reasons were given.

The respondents were incorporated by 4 Edw. VII. ch. 96 (O.), and the by-law in question was validated and confirmed by 5 Edw. VII. ch. 111 (O.).

The clauses of the by-law construed by the Board are those which relate to fares payable by "children" and "school children."

For the purpose of all fares (except the round trip fare, which is not to exceed twenty-five cents) three divisions are made of the line of route of the railway, and the clauses which deal with the fares, so far as they need be referred to, are:—

"(c) The cash fares to be taken by the company between the hour of six o'clock in the morning and midnight of the same day may be as follows:—For each passenger (for any distance in each of the divisions) a sum not exceeding five cents.

"Provided that every child under five years of age not occupying a seat and while accompanied by either of its parents or other person having it in charge shall be carried free.

"Provided that for every child under twelve years of age, except as aforesaid, the fare shall not exceed three cents between each of the above divisions.

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“(d) The company may charge double the said rates of fare between the hour of midnight and six o'clock in the morning.

“(e) The company shall keep tickets for sale upon all its cars run for the carriage of passengers, and shall sell the same at the following rates:—Ordinary tickets, six for twenty-five cents, each ticket to be taken in payment of a five-cent cash fare; children and school children's tickets, ten for twenty-five cents, each ticket to be taken in payment of a three-cent fare as above provided; workingmen's special tickets, eight for twenty-five cents, each ticket to be taken in payment of five-cent cash fare between the hours of 6.30 and 7.30 o'clock in the morning, and between the hours of 5.30 and 6.30 o'clock in the afternoon, but such last-mentioned tickets not to be good for fare at any other time.”

The order of the Board directs:

“9. That any person under twenty-one years of age actually attending school, upon the production of a certificate from his or her principal teacher that he or she is a *bonâ-fide* school child attending school, shall be entitled to purchase at any office where such tickets are sold or upon any cars of the respondent company ten tickets for twenty-five cents, such tickets to be taken in payment as fare between each of the divisions,” etc.

The provision as to the certificate is evidently taken from sec. 171 (2) of the Ontario Railway Act of 1906.

It was said that the company had entered into an agreement with the corporation to perform the terms and conditions of the by-law.

Much was said, on the argument, as to the meaning of the expression “school children,” and as to the age up to which a person could be properly described as a school child. Under the Public Schools Act, 1 Edw. VII. ch. 39, sec. 12 (3) (O.), it may seem that the public schools are for the benefit of children between the ages of five and twenty-one years, though it is only those who are between the ages of eight and fourteen years who are subject to the provisions of the Truancy Act, R.S.O. 1897, ch. 296. In other Acts other ages are mentioned in respect of certain educational purposes, and in the Ontario Railway Act of 1906, 6 Edw. VII. ch. 30,

sec. 171 (3), in the absence of special agreement, the reduced fare for school children (there called "pupils") is confined to those under seventeen years of age actually attending school. But I regard the discussion of this point as quite beside the real question, which is what is the true construction of the by-law, and the answer to this I consider reasonably clear.

The proviso says nothing about school children, enacting merely that, subject to the immediately preceding proviso as to children under five years of age, the fare for every child under twelve years of age shall not exceed three cents between each division of the railway line. Nothing is said as to school children, but such children may, of course, in fact be school children. If nothing else were said about it in the by-law, the fare would be payable in cash. Clause (e), however, provides for an alternative, namely, by the purchase and acceptance of "children and school children's" tickets. That clause, by its very terms, has relation to the proviso, declaring, as it does, that these tickets are to be taken in payment as three-cent fare "as above provided." But children only, and not school children *eo nomine*, are "above provided" for, though the former, as I have said, may be school children.

I think the latter word is used merely as another word descriptive of the class entitled under the proviso to be carried at the reduced rate, and does not let in children above the age of twelve years merely because they happen to be school children.

I would therefore allow the appeal.

R DDELL, J.:—The Ontario Traction Company, an Ontario company, applied to the township of Sandwich East for a "franchise" or right to construct and operate an electric railway along and across certain highways in the township, and made an agreement to abide by the terms imposed by by-law No. 384, dated 14th July, 1904, which will be found printed *in extenso* as schedule A to the Ontario statute, 5 Edw. VII., ch. 111.

It was claimed by the township that the Windsor and Tecumseh Electric R.W. Co., which had succeeded to the rights and obligations of the Ontario Traction Company, failed to fulfil its obliga-

tions in certain specified particulars; and the township applied to the Ontario Municipal and Railway Board. That Board proceeded "to construe and determine the proper meaning of" the by-law, and made an order accordingly. The railway company obtained leave from this Court to appeal from the said decision, under sec. 43 of the Ontario Railway and Municipal Board Act, 1906, 6 Edw. VII. ch. 31, and claims that the Board have erred upon a question of law.

The clauses giving rise to the difficulty are as follow:—

"(c) The cash fares to be taken by the company between the hour of six o'clock in the morning and midnight of the same day may be as follows: For each passenger, for any distance on the said railway in the same continuous route between the Pilette road in the township and any point in the city of Windsor, reached by the cars of the company, a sum not exceeding five cents; and between Pilette road and lot 129 in the first concession, a sum not exceeding five cents; and from lot 129 inclusive to the village of Tecumseh, a sum not exceeding five cents; and the round trip fare from Tecumseh to Windsor shall not exceed twenty-five cents.

"Provided that every child under five years of age not occupying a seat and while accompanied by either of its parents or other person having it in charge shall be carried free.

"Provided that for every child under twelve years of age, except as aforesaid, the fare shall not exceed three cents between each of the above divisions.

"Provided that no charge shall be made for carrying any police constable in the employ of the corporation, but such constable, when on duty and in uniform, shall be entitled to a ride free on any car run for the carriage of passengers.

"(d) The company may charge double the said rates of fare between the hour of midnight and six o'clock in the morning.

"(e) The company shall keep tickets for sale upon all its cars run for the carriage of passengers, and shall sell the same at the following rates: Ordinary tickets, six for twenty-five cents, each ticket to be taken in payment of a five-cent cash fare; children

and school children's tickets, ten for twenty-five cents, each ticket to be taken in payment as three-cent fare, as above provided; workmen's special tickets, eight for twenty-five cents, each ticket to be taken in payment of five-cent cash fare between the hours of 6.30 and 7.30 o'clock in the morning, and between the hours of 5.30 and 6.30 o'clock in the afternoon, but such last-mentioned tickets not to be good for fare at any other time."

The township complained that "the company has failed to fulfil its obligations respecting tickets, in that."

"(b) It does not supply ten tickets for a quarter to school children.

(c) It refuses to recognize children from the township attending school in Detroit as school children.

"(d) No such tickets are kept for sale upon its cars, nor, indeed, within the limits of the township."

The Board, without any written reasons of judgment, decided "that any person under twenty-one years of age, actually attending school, upon the production of a certificate from his or her principal teacher that he or she is a *bona-fide* school child attending school, shall be entitled to purchase at any office where such tickets are sold, or upon any cars of the respondent company, ten tickets for twenty-five cents, such tickets to be taken in payment as fare between each of the divisions mentioned in the first paragraph of sub-sec. (c) of sec. 15 of by-law No. 384 of the township of Sandwich East, as set forth in schedule A, ch. 111 of 5 Edw. VII., 1905."

The railway company contend that only children under the age of twelve years are entitled to ten tickets for twenty-five cents, and this is the point in the appeal.

Of course, the same rules must be applied to the interpretation of this by-law (which is really the agreement between the township and the railway company) which apply to any other contract. The meaning must be arrived at from a consideration of the circumstances under which the agreement was entered into, and the language employed to express the meaning of the parties—effect must be given, if possible, to every part of the

document, and all fair efforts made to have the document consistent with itself.

The argument of the respondent, in substance, is as follows:

Section (c) provides not for the fares that shall, but the fares that may, be taken. A general rule is first laid down, then there is a provision made for three classes of persons: (1) children under five not occupying a seat, but accompanied by parent or person in charge; (2) children under twelve not coming within class 1; (3) police constables in uniform.

No special provision is, in sec. (c), made for school children over twelve, nor for workingmen.

Section (e) provides for tickets; and now two classes, who have not been specially provided for in sec. (c), are taken care of, viz., school children generally and workingmen—"school children" are placed in the same category as "children"; workingmen have their special tickets at a special price.

It is contended for the respondents that both parties to this agreement recognized that there were children attending school who were over the age of twelve years, and intended that such children should not be debarred from cheap fares so long as they bought at least ten tickets—in the same way as a "workingman" would be allowed to have a much reduced rate if he bought at least eight tickets.

Any child under five may travel free; any child from five to twelve may travel on a three-cent cash payment at any time, but a child over twelve may not travel at any rate less than any one else, unless (a) he is a school child, and (b) he buys tickets. No child over twelve may claim to travel on a three-cent cash fare, any more than a "workingman" may claim to travel on a cash fare of 3½ cents or less than 5 cents.

It is argued that it would be placing too restricted a meaning upon the expression "in payment as three-cent fare as above provided" to read it as confining the benefit of the tickets to the persons who had by a previous section the right to travel upon a three-cent cash fare.

If this conclusion is right, it would seem that the question as

to who should be included under the description "school children" is one of fact, and not of law, and, consequently, the decision of the Board that all persons under twenty-one actually attending school are so included would not be applicable. Section 43 (2), which gives an appeal to the Court of Appeal, confines the right to questions of jurisdiction and of law.

If, however (the said conclusion being right), it be considered that the Court may deal with the interpretation made by the Board, I cannot say that the Board has erred, at all events in a sense of which the railway company can complain.

By the legislation in force at the time of the passing of the by-law, the assessors of every municipality were obliged to make a census annually of all children within the municipality between the ages of five and sixteen years and between the ages of five and twenty-one years, and a report was made by the clerk to the inspector, and to the secretary of the proper board governing schools: 4 Edw. VII. ch. 23, sec. 30; and see the form of general return, under sec. 18, in schedule E, columns 24, 25. All this was in addition to the census mentioned in sec. 29 of children between the ages of eight and fourteen, for the use of the truant officer and others. No doubt, the provisions of sec. 30 are introduced in view of "The Public Schools Act," 1901, 1 Edw. VII. ch. 39. That Act provides that "every person between the age of five and twenty-one years shall have the right to attend some school;" that in the sub-division of a township into public school sections "no section shall be formed which contains less than fifty children, between the ages of five and twenty-one years, whose parents or guardians are residents of the section, except" under certain circumstances (sec. 12 (3)); while it is "the duty of the trustees of all public schools . . . to provide adequate accommodation for all the children between the ages of five and sixteen years resident within the municipality" (or two-thirds if a rural section), according to the census, leaving out children of supporters of a separate school: sec. 65 (3).

The Separate Schools Act, again, R.S.O. 1897, ch. 294, provided for the establishment of Protestant and coloured separate

schools for the benefit and largely under the control of those "sending children to" such school: secs. 5, 8, 9, 12, 13, 17; and also for Roman Catholic separate schools. In all these schools the trustees must provide adequate accommodation "for all children between the ages of five and twenty-one years belonging to the supporters of their school:" secs. 28 (8), 33 (2), 16.

It is, further, provided by the Truancy Act, R.S.O. 1897, ch. 296, that "all children between eight and fourteen years of age shall attend school for the full term the school they have the right to attend is open, unless excused or for special reasons:" secs. 2, 3, 4; and the trustees must report to the truant officer the name, age and residence of all pupils on the school register who have not attended school as required by the Act.

I take it to be plain that the persons between the age of five and twenty-one who have the right to attend some school are the same as the children between the same ages mentioned in other parts of the statutes. All persons from five to twenty-one are called children for school purposes, and those from five to eight may, those from eight to fourteen must, and those from fourteen to twenty-one may attend school. All these are school children when they attend school; and it makes no difference of what particular age they may be or what kind of school, public or separate, they may attend. And this agrees with the ordinary meaning; for, as has been said, "'child' is ordinarily a synonym for infant, a person under the age of twenty-one years:" Stroud, *sub. voc.*

It was strongly urged that high school pupils could not be included in the category of "school children," and certain definitions were read to the Court indicating that "school" should be restricted to primary or elementary schools. I cannot assent to that proposition. No great—if any—advantage can result from a consideration of the etymology, deriving back, as it does, from the idea of "stopping" (Curtius' Principles, 5th ed., sec. 193) or "leisure," rather than "work." "In modern usage the term is applied to any place or establishment of education, as day schools, grammar-schools, academies, colleges, universities, etc.; but it is in the most familiar use restricted to places in which elementary

instruction is imparted to the young:" Century Dictionary, p. 5393, col. 2. This definition is well enough, if we do not unduly limit the application of the word "elementary." In our common parlance, the word is used of any place in which education is given of a character more elementary than that given in a "college" giving education of a post-matriculant character. In the term "school" are, I think, included high schools and collegiate institutes—these being high *schools* by statute. It is true that those who attend high schools are not called "children" in the Act, but "pupils"—this, however, is the name given throughout the legislation to persons in the primary schools while in the schools, and in their capacity of scholars—students—learners.

I am unable to see why those attending high schools are not just as much and as truly "school children" as those attending public or separate schools. And the same remark applies to those who, coming from or going to Detroit, attend school. I cannot think that either party to the contract had any intention of discriminating against any class of student minors.

The whole question, in my mind, is the right of children over the age of twelve years to be carried at any rate less than the ordinary adult; and in this I think that the appellants are right, and the appeal must succeed.

The by-law provides for: (1) two classes of person to be carried free; (2) the ordinary fare of five cents per division; and (3) the fare of three cents for a limited class, viz., children, i.e., those over five, but under twelve years of age. There are but two rates of fare, viz., five cents and three cents for cash. These are all the provisions fixing the rate of the fare. Then comes a provision for tickets: (1) ordinary tickets; (2) children and school children's tickets; and (3) workingmen's special tickets.

The first and third are "to be taken in payment of (a) five cents cash fare"—the third, however, only during certain hours—the second ten for twenty-five cents, "each ticket to be taken in payment as three cent fare as above provided." The three-cent fare, "as above provided," is only available for a child under twelve years of age; and I do not think it could have been intended

that a ticket worth or costing $2\frac{1}{2}$ cents should in the hands of any one be of more avail than three cents cash would have been. The provision is for "children and school children's tickets"—not "children's tickets and school children's tickets," or "children's and school children's tickets." The terminology, "children and school children's tickets," seems to have been adopted as a convenient expression to indicate the ticket—the one kind of ticket—which is equivalent to a three-cent cash fare, just as "workmen's special tickets" are tickets which, during certain hours, are equivalent to a five-cent cash fare, and "ordinary tickets" are tickets which at all times are equivalent to a five-cent cash fare. It seems to me that, if it had been intended that school children over twelve years of age should be carried at any rate less than adults, an express provision would have been made therefor.

The case of *City of Hamilton v. Hamilton Street R.W. Co. (Ticket Case)* (1904), 4 O.W.R. 207, 311, 411, 6 O.W.R. 607, 8 O.L.R. 642 (1905), 10 O.L.R. 594 (1906), 39 S.C.R. 273 (and see Cases in Supreme Court, vol. 281), seems to be in point. The by-law under consideration in that case will be found printed in the Ontario Statutes for 1893, at pp. 410 *et seq.* It provides that "(c) the said company may charge and collect from every person . . . a sum not exceeding five cents, except children under five years of age . . . such children to ride free . . . and the company . . . shall issue workmen's tickets at eight for twenty-five cents, good during" certain "hours . . . and shall also carry children between five and twelve for a cash fare of three cents or give ten children's tickets for twenty-five cents, and also carry free of charge all . . . constables . . ." "(b) The said company shall keep tickets for sale . . . upon their cars, and they shall sell tickets to persons desiring the same at a rate not exceeding twenty-five cents for six tickets for fare to any point. . . ." The company refused to keep tickets for sale in their cars, except those six for twenty-five cents; they claimed, also, to restrict the sale of "workmen's tickets" to certain named classes of the community. Upon application before trial, Mr. Justice Magee ordered

that the company should keep "workmen's tickets" for sale in the cars to workmen (4 O.W.R., at p. 211), and at the trial Mr. Justice Street held that the public generally were entitled to "workmen's tickets" (8 O.W.R., at p. 644), without regard to the occupation or want of occupation of the person desiring to use them, and that children, when going to school, were not excepted by reason of the fact that a subsequent by-law and agreement bound the company "to give to any child between five and fourteen years of age, when going to school, a ticket to go and return on the date of issue for five cents" (8 O.L.R., at p. 646).

This judgment was affirmed by the Court of Appeal: 10 O.L.R., p. 594. "They were designated 'workmen's tickets' for purpose of reference only, and not because they were intended for use by some special class of citizens supposed to come under the undefined description of 'workmen.'" And this has been affirmed by the Supreme Court: 39 S.C.R. 673.

Under this case we must hold, I think, that the "workingmen's tickets" in the present instance are not intended solely for those who may be in reality "working men"—that the clause (e) is not introduced to give an advantage to a new set of persons not previously provided for, viz., "workingmen." And it seems to follow that the proposition that clause (e) provides for the supposed new class, "school children," not previously provided for, must also fall to the ground.

I am of opinion that the appeal should be allowed with costs, including the costs of the application for leave to appeal.

MOSS, C.J.O., GARROW and MACLAREN, J.J.A., concurred.

CATTLE AT LARGE—FENCES.

QUEBEC.]

[SUPERIOR COURT.

LAPORTE V. CANADIAN NORTHERN QUEBEC R.W. Co.

(Unreported. Translation.)

Railway—Animals killed on track—Escape to highway from enclosure—Open gate from highway to station ground—Fence and gate not of sufficient height—Negligence—Contributory negligence—Sec. 237, subsec. 4, Railway Act, 1903.

The plaintiff's horses escaped from his field by jumping over a fence of insufficient height and going upon the highway, went a short distance, got on to the track through an open gate leading to defendants' station ground where they were killed by a train.

Held, that the company was not negligent by failing to keep their gate closed through which the horses reached the track, and the negligence of the plaintiff in having a fence of insufficient height was the cause of the accident.

THE Court having heard the witnesses and the attorneys of the parties on the merits of this case, examined the documents and the proceedings of record and on the whole deliberated, rendered the following judgment:—

The plaintiff alleges in his action:—

(a) That on the night between the 3rd and 4th of June, 1907, three horses, the plaintiff's property, were killed by a train of the defendant on the property of the defendant, namely, on the railway crossing at the parish of St. Nobert in the county of Berthier, district of Joliette.

(b) That the price and value of the plaintiff's three horses so killed is \$310.

(c) That the defendant during the night of the accident left open the two gates giving access from the public road to its station and its railway on the one side and to its freight platform on the other side.

(d) That plaintiff's horses entered by the said gate on the property of defendant, where they were killed.

(e) That the said horses were killed at several arpents from the station at a little distance one after the other.

(f) That the train which thus killed plaintiff's horses did not stop at St. Nobert station, nor after any of the said accidents above mentioned, as required by law and by the rules of the company.

(g) That there was no light at the station, or near it, during the night of the accident, as required by law and by the rules of the company.

(h) That the said horses were so killed by the fault and neglect of defendant and its employees.

(i) That in consequence the defendant is legally responsible for the loss of the horses and the plaintiff has a right to claim from it their value, \$310, which defendant refuses to pay, although requested so to do, and the plaintiff claims the said sum with interest and costs.

As a defence to this action the defendant company pleads as follows:—

(a) It is ignorant of paragraphs 1, 4 and 5.

(b) It denies paragraphs 2, 3, 6, 7 and 9.

(c) That if any accident took place as alleged its cause is attributable to the negligence and imprudence of plaintiff and his violation of the laws relative to railways.

(d) That the plaintiff was negligent in not keeping his horses in his pasture as he should have done, and in failing to follow the municipal regulations, and it is on account of this negligence that the plaintiff's horses strayed from his pasture and got on to the public road and there got on the defendant company's railway where the accident took place.

(e) That this accident is not attributable in any way to fault or negligence of the company or any of its employees, who did all that the law bound them to do with respect to protection.

Wherefore defendant prays for the dismissal of plaintiff's action.

The plaintiff by his reply reiterates the allegations of his action and denies the defence and persists in the conclusions of his declaration.

December 31, 1907. DE LORIMIER, J.:—It results from the proof that the plaintiff at the time of the accident in question owned land in the parish of St. Nobert shewn on the plan produced by defendant as exhibit "D. I." in this case; on one side of the public road was plaintiff's house where he resides with his family, and on the other was his pasture where he kept his animals, including the three horses in question in this cause; there was a gate opening into this pasture to permit access from the public road.

It is proved by the plaintiff himself that on the night before the 3rd and 4th of June his three horses were in this pasture; they were three horses of one, two and four years old respectively.

While plaintiff affirms that on that evening these horses were yet in his pasture, it is certain that they got out of it about half past nine on the evening of the third of June, as two witnesses swore to have seen them straying on the public road at this hour, and this proof is beyond all doubt.

After having got out of the pasture and having strayed part of the night on the public road, the young horses entered by the opening or gate on the land of the company defendant. This gate opens on to the road, which conducts to the station of defendant and the proof shews that this gate cannot be kept closed; the persons who have to do business in this station of defendant open this gate during the day and during the evening and do not close it again. During the night between the 3rd and 4th of June last, the three young horses of plaintiff, after having escaped from their pasture strayed on the public road and entered by this gate on to the land of the company and from there got on to the railway. It is evident that these three young horses were struck during the night and darkness by one of the trains of defendant. Two of the horses were killed on the spot and the third was dragged some distance from the others, and when it was found in the morning it was mutilated so that it had to be killed at once.

It appears that at a given moment on that evening the agent

at the station did not put his customary light there, but this fact one way or the other has no connection with the action in question. The proof establishes that if the horses in question were killed it was a pure accident in so far as the defendant or its employees were concerned.

The plaintiff's contention is that it is sufficient for him to prove the fact of the accident and the amount of his damages and that this accident took place on the railway of the defendant, and it was then incumbent on the company to destroy the presumption of its responsibility by establishing some fault or voluntary act on the part of plaintiff as being the cause of the accident.

This matter is now regulated by the Federal Statute of 1903, Railway Act, 3 Edw. VII. ch. 58, sec. 237, sub-sec. 4, sanctioned on the 24th October, 1903; this statute enacts as follows:—

4. When any cattle or other animals at large upon the highway or otherwise, get upon the property of the company and are killed or injured by a train, the owner of any such animal so killed or injured shall be entitled to recover the amount of such loss or injury against the company in any action in any Court of competent jurisdiction, unless the company, in the opinion of the Court or jury trying the case establishes that such animal got at large through the negligence or wilful act or omission of the owner or his agent, or of the custodian of such animal or his agent; but the fact that such animal was not in charge of some competent person or persons shall not, for the purposes of this subsection, deprive the owner of his right to recover.

Before this statute the proprietor of the animal straying on the public road, had generally no recourse against a railway company if this animal was killed or wounded on the line of the company. The law of 1903 considered that the sole fact that the animal was straying was against the company, but it created at the same time in favour of railway companies an exception based on the act or fault of the proprietor, and, when this exception is pleaded and justified, the law completely exonerates the companies of all recourse by the proprietor.

This law well recognized that if the animal is thus killed or injured it is due to the fact that it has escaped and that it is straying on the public road, and, it exempts the railway companies from all liability under such actions for indemnity, if the company establishes that the animal in question escaped on account of the negligence or the voluntary act or of the fault of its proprietor or of the agent of the person who had charge of the animal.

It is to the moment when the animal escaped that the law refers; if at that moment the proprietor of the animal is in any way in fault, by simple negligence, simple fault or a stronger reason, his voluntary act and the animal escaped and was straying on the public road in consequence of his negligence or his fault or voluntary act, then in that case the law exonerates the railway company against all recourse. The law in such case denies any right or recourse on the part of the proprietor.

The defendant company, to take advantage of the law above stated, has therefore tried to establish that if these three young horses in question, escaped or were straying on the public road, the plaintiff himself at that moment was the party who caused this to be so.

It is certainly a fact that these three horses got out of plaintiff's pasture on the evening of the third of June last.

The plaintiff pretends that his fences and his gate were of sufficient height, but the defendant established in a manner that cannot leave any possible doubt, that these fences in front of the pasture were only 3 feet to 3 feet 6 inches in height in certain places.

These measurements were made correctly with a foot rule, and this proof is more convincing and is better than that offered by the plaintiff, whose witnesses, relations, or friends speak without having made any measurements. As a matter of fact "the person who proves too much, does not prove anything" (*Qui prouve trop, ne prouve rien*), and if the evidence of the plaintiff's witnesses can be taken to be true it will establish the fact that the three young horses in question could not possibly have

escaped from this pasture, and this evidence would be *reductio ad absurdum*.

The proof on the part of the defendant is the only convincing proof and it explains perfectly how it happened that the young horses got at liberty and were straying on the public road. The fences of 3 feet, even 3 feet 6 in., cannot, as the proof establishes, keep in young horses of from one to four years, and whether the young horses are vicious or not.

They may not have jumped this fence on a previous occasion it is possible; that does not prove anything, but the fact having happened that proves that the fact is possible.

There is as much an act of negligence in not preventing what may happen in the ordinary course of events, as in not remedying that which has already happened. It is evident under the circumstances that there is not proof of voluntary escape, he is negligent in having placed these horses in a pasture with a fence 3 feet or 3 feet 6 inches high in front of this pasture.

Every prudent man should be reasonable and should certainly foresee that young horses with all their impetuosity and with their natural agility could get over such a fence. The proof establishes that this is not the ordinary height of fences in the country, and it is impossible for this Court to come to any other conclusion, but that it was on account of the insufficient height of this fence in the plaintiff's pasture must be attributed the fact that the horses in question escaped and were straying on the public road, and consequently that this fact is attributable to the negligence, fault and improvidence of the plaintiff himself.

Under these circumstances we must maintain that the company defendant is justified in the allegations of its defence, consequently this Court maintains the plea of defendant and dismisses the plaintiff's action with costs.

FENCING—ANIMALS KILLED ON TRACK.

IN THE FOURTH DIVISION COURT OF THE DISTRICT OF RAINY RIVER.

ONTARIO.]

[T. W. CHAPPLE, District Judge.

QUINN V. CANADIAN PACIFIC R.W. CO.

(Unreported.)

Liability to fence—Lands not enclosed—Cattle at large—Railway Act, secs. 254, 294—Railway Act, 1888, sec. 194—53 Vict. ch. 28, sec. 2, sub-sec. 3.

Section 254(4) of the Railway Act is not retroactive. The exemption from the obligation to erect fences in localities described in this subsection, does not relieve a railway company from liability for animals killed on the railway where fences were erected before the passing of the Act, and were thereafter maintained.

The track of a railway company passing through a locality in which the lands on either side were not enclosed and either settled or improved (sec. 254(4) Railway Act) was fenced on both sides where adjacent to a public highway.

The plaintiff's cow was turned out of its stable to pasture on unenclosed land and wandered along the public highway (which highway ran parallel to the railway) until it got upon the property of the defendants through their defective fence, where it was killed.

Held, (1) That the defendants had not established upon the evidence that such animal had got at large through the negligence or wilful act or omission of the plaintiff.

(2) That the defendants having erected the fence although not bound by law to do so and maintained it before and since the passing of the Act, are not exempted from liability to the plaintiff under section 254(4) of the Railway Act.

ACTION to recover the value of a cow killed on the defendants' railway.

Tried before T. W. Chapple, Esquire, District Judge at Dryden, on 3rd April, 1908.

The plaintiff appeared in person.

James Auld (Winnipeg), for the defendants.

The facts and authorities cited are set out in the judgment.

April 10, 1908. T. W. CHAPPLE, District Judge:—This is an action brought by the plaintiff to recover from the defendants the sum of \$75, being the value of a cow killed by one of the defendants' trains on the 20th day of October, 1907.

The matter coming on for trial before me at a former sittings of this Court, I gave judgment in favour of the plaintiff but on an application for a new trial being made it appearing to me that all material facts had not been elicited, I granted a new trial, and the action again came on before me at Dryden on the third day of April, 1908, when I reserved judgment, which I now give.

The facts are not in dispute and are as follows:—

The plaintiff resides at Dinoric a small place through which the defendants' line of railway passes. A plan has been registered of what is called the townsite of Dinoric, the land, however, is in what is known as unorganized territory, that is, there is no municipal organization within many miles of it. To the North of the right of way of the defendants' railway, there is a road running parallel with their railway line and known as the Government Road, and upon the plan referred to is called Railway Avenue. Along the South side of this road and separating it from their property the railway company, some ten or more years ago, erected a fence extending about two and one-half or three miles in length in which are two or more gates used for the purpose of passing from said Government Road on to or across the property of the railway company—and it is admitted said fence was erected for the purpose of keeping animals from straying upon the railway property; this fence, when it became defective from time to time, was repaired by the defendant company, and the gates were maintained by them and kept closed or intended to be except when in use. The evidence shews that on various occasions cattle strayed upon the tracks either owing to the fence being defective or gates left open, and that some of them had been killed or injured by the defendants' trains, and damages paid by the defendants for said injuries. On the land to the North of the Government Road there have been erected in all in that locality (Dinoric) eleven buildings consisting of dwelling houses, a store, a hotel and some stables, but very little of the land is cultivated, and with the exception

of a fence around about three acres of land cleared by the plaintiff there is no other fence in that locality for many miles, except the fence already referred to erected and maintained by the defendants.

On the 20th of October last the plaintiff turned his cow out of its stable as he had been accustomed to do daily, as it with other cattle pastured in that vicinity, the land being mostly in a state of nature, and it wandered Westward along the Government Road and got upon the property of the railway company through the said fence being defective, it being a wire fence was repaired on the following day by the defendants' servants. The animal having been badly injured by one of the defendants' trains running Eastward at a high rate of speed and passing by Dinoric without stopping, was killed by the section foreman, to put it out of pain, and the body was taken charge of and disposed of by the defendants' servants.

Sub-section 4 of section 254 of the Railway Act provides that: "Whenever the railway passes through any locality in which the lands on either side of the railway are not enclosed and either settled or improved, the company shall not be required to erect and maintain such fences, gates and cattle guards unless the Board otherwise orders or directs."

It is admitted that no direction whatever has been made by the Board as to fences in this locality, and I am of the opinion that the company would not *now* be under any obligation to erect and maintain fences at the place in question, by reason of said section 254 of the Railway Act, or in other words they would be exempted from so doing by said sub-section 4, if they had not erected and maintained the fence that is now there. See *Cortese v. Canadian Pacific R.W. Co.*, 13 B.C.R. 322, 7 Can. Ry. Cas. 345; *Biddeson v. Canadian Northern R.W. Co.*, 7 Can. Ry. Cas. 17; *Phair v. Canadian Northern R.W. Co.*, 5 Can. Ry. Cas. 334, and several other authorities.

At the time of the erection of said fence by the company, the clause then in force governing their liability was section 194 of

the Railway Act, 1888, as amended by 53 Vict. ch. 28, sec. 2, and sub-section 3 thereof, reads as follows:—

“If the company omits to erect and complete as aforesaid any fence or cattle-guard, or if after it is completed the company neglects to maintain the same as aforesaid, and if in consequence of said omission or neglect any animal gets upon the railway from an adjoining place where under the circumstances it might properly be, then the company shall be liable to the owner of every such animal for all damages in respect of it caused by any of the company’s trains or engines, and no animal allowed to run at large shall be held to be improperly on a place adjoining the railway merely for the reason that the owner or occupant of such place has not permitted it to be there.”

The company having therefore erected the fence as they were bound to do under the Act then in force, and having maintained it both before and since the passing of the Act as it now is, and by such erection and maintenance of it having induced the plaintiff to allow his cow to be at large upon the land where it might properly be, I find that they are not exempted from liability under sub-section 4 of section 254 of the Railway Act. In other words, the Act now in force is not retro-active, and the exemption from the obligation to erect fences in localities coming within said sub-section, does not relieve them from liability where fences were erected before the passing of the Act now in force, and not only allowed to remain there but have been maintained and repaired from time to time as occasion required.

The cow, therefore, having got upon the property of the company through their fence being defective, the defendants are clearly liable, “Unless the company has established that such animal got at large through the negligence or wilful act or omission of the owner”—as provided by sub-section 4 of section 294 of the Railway Act. It is there clearly stated that when cattle at large, whether upon the highway or not, get upon the property of the company and are killed or injured by a train, the owner of any such animal so killed or injured shall be entitled to recover the amount of such loss or injury against the company

unless it comes within the exception above stated. So that *prima facie* under such circumstances the company are liable and the onus is upon them to shew that they are not. In *Rysdale v. Wabash R.W. Co.*, 7 O.W.R. 677, the Master said: "The law is now that if animals at large get on the property of a railway company and are killed or injured by a train (unless where the highway crosses the track) the railway company are liable *prima facie*."

And Chancellor Boyd, in referring to this sub-section in *Lebu v. Grand Trunk R.W. Co.*, 12 O.L.R. 590, 5 Can. Ry. Cas. 329, said: "But in the last and new sub-section there may be recovery for an animal at large killed upon the property of the railway company by a train, though the animal was not in charge of a competent person. This large and liberal meaning has been given to this new sub-section in various cases, some being in the Divisional Court such as *Bacon v. Grand Trunk R.W. Co.*, 12 O.L.R. 196, 5 Can. Ry. Cas. 325; *Arthur v. Central Ontario R.W. Co.*, 11 O.L.R. 537, 5 Can. Ry. Cas. 318, and we see no reason to disagree with such reading."

There is a long line of cases decided previous to the last amendment to section 294 dealing with somewhat similar matters such as *Davidson v. Grand Trunk R.W. Co.*, 5 O.L.R. 574, 2 Can. Ry. Cas. 371, where it was held that, "Where a breach of a statutory duty has been committed by the railway company and the consequence of that breach has been the killing of the cattle on the railway by the railway company's trains, the company are liable," but I do not require to refer to any of these except the recent one of *Carruthers v. Canadian Pacific R.W. Co.*, 39 S.C.R. 251, 7 Can. Ry. Cas. 23, which affirmed the judgment of the Court of Appeal of Manitoba holding that the company were liable in damages for the loss sustained, notwithstanding that the animals got upon the track while at large in a place other than a highway intersected by the railway.

The defendants, however, contend that they have established that the cow in question in this action *got at large by the wilful act* of the plaintiff, and, therefore, he cannot recover, they do

not contend, however, that there was any negligence or omission on the part of the plaintiff. In other words they allege that he having wilfully or deliberately, of his own free will, turned his cow out of the stable and thus "got at large" comes within the meaning of the exception in said sub-section. With this, however, I am unable to agree. In a somewhat similar case where the animal that was killed escaped from its stable and got on the track and was killed, reported at page 162 of 44 C.L.J., *Douglas v. Grand Trunk R.W. Co.*, the learned Judge said: "I cannot give effect to the argument of counsel for the defendants when he agrees that the plaintiff's servant negligently allowed the animal to escape from the hotel stable."

It is admitted that there was nothing *wrongful* in the plaintiff turning his cow at large to pasture where it had a right to be, there being no municipal by-law prohibiting same. In *Fensom v. Canadian Pacific R.W. Co.*, 7 O.L.R. 254, 8 O.L.R. 688, 2 Can. Ry. Cas. 376, 3 Can. Ry. Cas. 231, 4 Can. Ry. Cas. 76, it was held that the company were liable where cattle running at large, where they had a right to be strayed upon the track and were killed.

Mr. Justice Riddell deals with this matter in *Yeates v. Grand Trunk R.W. Co.*, 14 O.L.R. 63, 7 Can. Ry. Cas. 4, in which he held that where the plaintiff, knowing that it was his duty to keep a certain gate in repair and that the gate was not safe, deliberately or wilfully put his animals into the field from which they got upon the railway property and were killed, could not recover, he being guilty of contributory negligence.

Bacon v. Grand Trunk R.W. Co., 12 O.L.R. 196, is also very much in point in which judgment was given by the Divisional Court against the defendants.

There is no doubt that the word "wilful" as used in common parlance means "*intentional*," but taking as it appears in section 294, in connection with the words "negligence" and "omission." I think it must be taken to mean the doing of something *wrongful*. As in the case of *Yeates v. Grand Trunk Railway*, the plaintiff did what he should have known was wrongful.

In this case the plaintiff says, it being a fine day, he turned his cow out of its stable to get sunshine and fresh air, and to pasture, as he had been accustomed to do. There certainly was nothing *wrongful* in this act, while it was done voluntarily or deliberately, he was only doing what he had a right to do, and there are many authorities where it has been held that where one *bona fide* believes that his act is right, *it is not wilful*. There was no reason for him to anticipate the cow getting on the defendants' property there being a fence between the railway right of way and the highway which had been erected by the defendants for the purpose of preventing cattle from getting on their property and which had been there and served that purpose for several years, and would have on this occasion if it had not been defective.

In *Daigle v. Temiscouta R.W. Co.*, 37 N.B.R. 219, 6 Can. Ry. Cas. 33, the cattle were turned out into a common pasture and from there in some manner, which was not shewn, strayed upon the property of the defendants and were killed. The Court in giving judgment against the railway company said: "The cattle had a right to be where they were pasturing, and it was through no fault of the plaintiff or his agent that they strayed upon the track of the defendant company."

In *Arthur v. Central Ontario R.W. Co.*, 11 O.L.R. 537, 5 Can. Ry. Cas. 318, the plaintiff, it may be said, wilfully, at any rate deliberately, of his own free will, took his three horses to water on the highway, two of which were unaltered and which became, without doubt, "at large," and passed off the highway on to the property of the company and one was killed. It was there held that the horses did not get at large through the negligence or wilful act or omission of the plaintiff and he was entitled to recover the value of his horse.

The judgment of the Court of Appeal of Manitoba in *Clayton v. Canadian Northern R.W. Co.*, 17 Man. L.R. 426, 7 Can. Ry. Cas. 355, was strongly relied upon by the defendants, but in that case the plaintiff's agent turned several of the plaintiff's horses loose into a field from which there was, *to the knowledge*

of both, free access to the public road through an opening in the fence left by the removal of a gate.

There it was held that "the horses got at large through the negligence or wilful act or omission of the owner," the circumstances being very similar to those in *Yeates v. Grand Trunk Railway*, the negligence or wilful act consisting in turning them at large with the knowledge that they could escape through a defective fence. Mr. Justice Phippen in delivering judgment said: "Once it appears the injured animal got upon the railway through a defective fence, a statutory responsibility arises, unless the company can establish that the animal was at large through wilful intent, omission or negligence."

Perhaps the strongest judgments in favour of the defendants' contention are *Becker v. Canadian Pacific R.W. Co.*, 7 Can. Ry. Cas. 29, and *McDaniel v. Canadian Pacific R.W. Co.*, 13 B.C.R. 49, 7 Can. Ry. Cas. 34, which, although not binding on us, are of much assistance, and there the plaintiffs were held not entitled to recover owing to the animals having got at large through the negligence or wilful act or omission of the owner, but the facts therein differ from the facts in this case that the animals did not get through a defective fence erected by the company, even although the company would not *now* be bound to erect same under the Railway Act, unless the Board so directed.

The words of the sub-section 4 are so clear that the company are *prima facie* liable, that each action must be governed by the facts established by the evidence, that I do not consider it necessary to refer to any further authorities, many of which I have considered.

I therefore find that the plaintiff's cow being at large upon the highway got upon the property of the company through their defective fence and was killed by one of their trains, and that the company have not established that such animal got at large through the negligence or wilful act or omission of the plaintiff.

The value of the cow being admitted, I give judgment for the plaintiff for \$75 with costs.

FLAG STATION—FACILITIES.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.]

WINNIPEG JOBBERS & SHIPPERS ASSOCIATION V. CANADIAN PACIFIC,
CANADIAN NORTHERN & GRAND TRUNK PACIFIC RY. COS.

(*Flag Station Case, No. 871.*)

Jurisdiction of the Board—Flag station—Agents—Annual earnings—Grain shipments—Secs. 30(g), 258, 284(1)(a) & (3), Railway Act.

Under secs. 30(g), 258, 284 (1)(a) & (3) of the Railway Act, the Board has jurisdiction to require a railway company, to erect and maintain platforms or freight sheds or any other structures or works that may be deemed reasonably necessary for the protection of property or the public at stopping places on the railway (known as flag stations) used for unloading and delivering traffic.

At such stations a suitable shelter or waiting room should be erected for both passengers and freight, provided with a door and windows, proper platforms and approaches.

At stations where the total freight and passenger earnings amount to \$15,000 per annum the company should appoint and maintain permanent agents; at points where the business consists principally of shipping grain, and such shipments amount to at least 50,000 bushels, agents should be appointed and maintained during the grain shipping season; at points of shipment where a telegraph operator is located for the handling of trains he should be provided with the necessary equipment to handle all traffic thereat.

THIS complaint was brought before the Board under the circumstances mentioned in the judgment.

The Chief Traffic Officer to whom the matter was referred made the following report, dated 15th November, 1907:—

The application of the Winnipeg Jobbers' and Shippers' Association through Mr. Carpenter, manager of its Transportation Department, dated February 8th, 1907, asks the Board to order the railways companies,—

(a) "Where the traffic warrants it, to erect a freight shed, and appoint a permanent agent in charge of the business at such station;"

(b) "Not to reduce any regular station with an agent in charge to a flag station without an agent;"

(c) "Not to close any regular or flag station without the approval of the Board of Railway Commissioners."

The applicants object also to the terms of the "Release of Responsibility" which the shipper of freight to a flag station is required to sign.

According to your letter of 2nd ultimo, the papers in the case were referred direct to Mr. Dillinger. His instructions are not attached, and his report is a general one. Seventy-six flag stations are mentioned in the list submitted by the applicants, 30 of which are on the Canadian Pacific Railway and 46 on the Canadian Northern. Mr. Dillinger could not possibly visit all these points, but he reports that at many of them there is absolutely no accommodation for passengers or freight.

He recommends that at stopping places the companies be required to furnish a platform of standard width and at least 60 feet long; also a combined passenger and freight shelter; the part devoted to passengers to be provided with seats, and with heat during cold weather; that devoted to freight to be kept under lock and key, in charge of the section foreman, if available, or of an outside trustworthy person, whose services might be secured, Mr. Dillinger thinks, for a nominal sum.

I endorse Mr. Dillinger's recommendations, but if any order be issued in the case, would make it more specific. Excepting his suggestion *re* platform, I see no reason for varying materially the provisions of the order of the Board No. 3,253, dated June 25th, 1907, and I would recommend the following specifications and directions regarding flag stations for general adoption, unless exceptional conditions are, in any case, shewn to exist:—

That at each stopping place, which is not a regular station or agency (or at any designated point, as the case may be) established on its railway for the receiving and delivery of traffic, the company shall provide a suitable station or shelter enclosed on all sides, with a platform of standard width and not less than 60 feet in length; the waiting-room to be not less than 16 feet

in length and 12 feet in width, floored and weather proof, and provided with a door and with seating accommodation for at least ten persons; to be sufficiently lighted by glazed windows, and by lamp after dark, while the train is at the station and for at least thirty minutes previously, and during the same period to be sufficiently warmed in the cold weather; the building to be kept clean at all times, and the platform reasonably clear of snow; the freight room to be kept locked and opened only by the caretaker or other authorized employees of the company, and the premises placed in charge of a caretaker who shall reside near enough to perform properly the duties required by this order; further, that the station be shewn on the company's time tables and passenger and freight tariffs.

Mr. Dillinger also recommends that any flag station which shews total freight and passenger earnings for the year amounting to \$15,000 (which need not, as he suggests, be divided equally between inward and outward traffic) be advanced to a regular station in charge of an agent during the whole year; except that at points where the traffic consists principally of grain shipments, running to a minimum of 50,000 bushels for the shipping season, agents be appointed during the grain-shipping season only; in other words, that the agent may be temporarily withdrawn after the grain shipments at such stations have been completed, and until they are resumed after the succeeding harvest. This is the Minnesota law, but the Canadian West is less settled, and it seems to me that on the Canadian Pacific, Canadian Northern and Grand Trunk Pacific lines west of the lakes an annual business of \$12,000 should be sufficient to call for the appointment of an agent. This is a point which might reasonably be discussed with the companies.

Mr. Dillinger makes final recommendation that at any shipping point where the company may place a telegraph operator for the handling of trains, the operator should act as agent so long as the company finds it necessary to keep him there, and that for this purpose he should be supplied with the requisite

tariffs and stationery. This seems to me to be a reasonable arrangement.

The applicants submit lists of flag stations which they consider should have agents. Several of the points shewn on these lists have since been opened as agencies. In the Canadian Pacific Railway list, for instance, agents have since been appointed at the following:—

Headingley	Theodore	Belle Plain
Treesbank	Osage	Midale
Churchbridge	Pilote Butte	Wilcox

This statement, if correct, shews that the annual earnings at some of the points are very low, and not such as to bear agency expenses.

It does not appear to me that the Railway Act gives the Board power to grant the request of the applicants that the companies should not be permitted to reduce any regular station, with an agent in charge, to a flag station, without an agent, without the approval of the Board; and as pointed out above, the appointment of temporary agents during the grain-shipping period would involve reduction to flag station status for the remainder of the year.

As regards the request that no regular flag station should be definitely closed without the approval of the Board, I am unable to find that this is strictly authorized by the Act, but probably such power is indirectly conferred by sub-section 3, section 328, wherein ten days' notice is required before any special freight tariff can be advanced. The closing of a station involves the withdrawal or cancellation of the rates to and from that station, and a cancellation of rates is equivalent to an advance; at any rate, cancellations are so considered, and ten days' notice thereof is always given. It cannot be overlooked, however, that cancellation of special tariffs at any station that is not being closed throws the traffic affected into the next higher tariff—perhaps the Standard—consequently, this is literally an advance; where-

as if the station is closed, all the tariffs, including the Standard, are withdrawn and no rates are left. This may be fatal to the view I have advanced; but I consider that the public should be given reasonable notice before the closing of station, and that, if necessary, section 284 should be so amended.

As regards the "Release of Responsibility," I consider the objections are well taken. A sample of this "release," Canadian Pacific Railway, Form 25B, is attached. It reads as follows:—

"In consideration of the Canadian Pacific Railway Company having received the above property from _____ consigned to _____ for transportation on their line from _____ station to _____ station, I do hereby release said company, and all other transportation companies, over the lines of which said property must pass to arrive at its destination, from all liability for chafing, breakage or damage of any kind, to any of it, except such as may occur from collisions of trains, or cars being thrown from the track while carrying it, and agree to pay all the charges accruing on the same at tariff rates. I do also release said company from all loss or damage that may occur to any of the above mentioned property after it has been unloaded from the cars at _____ station on their line."

This release requires the signature of the shipper and a witness.

As printed, it applies to all freight shipped to regular or flag stations, that I understand it is not now required for shipments to regular stations. It is at variance with the freight classification authorized by the Board, rule 7 of which defines the nature and extent of the risk to be borne by the shipper. There is, of course, a certain risk attached to flag stations which does not, to the same extent, exist at regular stations, arising from the lack of the same supervision; but so far as the loading and unloading are concerned, I do not consider that the company should assume any less responsibility at flag stations than at the agencies. If there is no platform or shelter, they should be

provided; the goods should not be thrown promiscuously on the side of the track, perhaps in the ditch, and left there exposed to the weather. Any protection not given by the classification seems to be amply provided for in the companies' bill of lading. For these reasons, it is my view that sufficient cause for additional limitation of liability at flag stations does not exist, and that the "release" declaration referred to should be abolished without waiting for the consideration by the Board of the bills of lading and other traffic forms.

Copies of this report having been sent to the railway companies concerned, written arguments were submitted to the Board, the material portions of which are as follows:—

May 1, 1908.

E. W. Beatty, for the Canadian Pacific Railway Co.

1. *As to the jurisdiction of the Board.* This company would not object, where traffic warrants it, to erect a freight shed and appoint a permanent agent in charge of the business at such station. It is obvious that it would be in the interests of the railway company to do so. It is equally obvious that any order requiring this to be done could not or should not be made by the Board.

Section 258(1) is confined to existing stations, sub-section 2 to the location of new stations, sub-section 3 gives the Board power to order a railway company to maintain and operate stations with such accommodation or facilities in connection therewith as may be defined at such points on the railway as are designated in the order *when and only when* the railway in respect of which the order is sought to be made *has been subsidized in money or in land under the authority of an Act of the Parliament of Canada after July the 18th, 1900.*

There is no provision in the Act expressed or implied, giving jurisdiction to the Board to order the establishment of stations on railways *not so subsidized.*

A flag station is not a station at which business of the com-

pany is contracted. Goods are not billed therefrom, nor does the railway hold itself out as collecting or delivering goods thereat. To all intents and purposes, it has no more significance from a railway operating standpoint than if a train were to stop between stations for the purpose of allowing a passenger to alight, or a consignee to take more convenient delivery of his goods direct from the company's care. A flag station, so called, is not a station such as is contemplated by section 258.

Railway companies are required, in section 284 of the Act, according to their powers, to furnish *at the places of starting, and at the junction of the railway with other railways, and at all stopping places established for such purposes*, adequate and suitable accommodation for the receiving and loading of all traffic offered for carriage upon the railway, and to furnish adequate and suitable accommodation for the carrying, unloading and delivering of all such traffic; this section only applies to *stopping places established for the purpose of receiving and loading its traffic*.

If the Board has not power to order the establishment of a regular station except on the railways specified in section 258, it cannot have power to order the establishment of flag stations or to change a flag station to a regular station, or to prohibit the reducing of a regular station to a flag station. If it possessed any of the above powers the implied negation of such power contained in section 258 would be unnecessary.

Practically such a power, even were it conferred by the Act, would be of no avail because if a railway company has the right to select its own stopping places it must have the right to establish and disestablish them at will, and any order which the Board might make under section 284 requiring accommodation to be furnished, would be rendered nugatory if that stopping place at which the accommodation was ordered were abolished.

The Chief Traffic Officer finds that the closing of a station is not authorized by the Act, except in so far as the power is indirectly conferred by sub-section 3, of section 328, wherein ten

days' notice is required before any special freight tariff can be advanced.

He is in error in assuming that the closing of a station involves the cancellation of rates and a change of tariff, and even were this the case the cancellation of the tariff would not make the standard tariffs applicable when there was no station to which they could be applied.

There is nothing in the tariff sections of the Act to prevent a station being abolished, or its character changed.

2. *On the merits no blanket order should be made.* The Chief Traffic Officer has recommended specifications and directions for general adoption.

These recommendations are impracticable and unreasonable to the railway companies. No regard has apparently been had for the interest of the railways, and the suggestion of the Chief Traffic Officer is based on the assumption that at all flag stations the traffic received and delivered justifies the outlay of large amounts in capital expenditure.

The provisions of section 284 should be construed in the light of ordinary railway and business practice, otherwise they are reduced to an absurdity. If, for example, a railway established a flag station for the convenience of a few residents of a locality and the total business at which, and those of nearby points, did not amount to two shipments per year, could it be reasonably argued that the Board, in the exercise of its powers (if such powers existed) should order the company to provide accommodation in accordance with the Chief Traffic Officer's recommendations, at a cost out of all proportion to the benefits received?

It has been suggested that a regular agency should be substituted for a flag station when the earnings on inwards freight amount to \$10,000 per annum, and on outwards freight to \$5,000, or a total of \$15,000, and that if a certain percentage of the outwards earnings is on grain a regular agency should only be maintained during certain specified portions of the year.

Judged from the standpoint of the practical necessity for the

establishment of a regular station, the earnings, whether inwards or outwards, cannot form any true basis. For example, the freight earnings on two or three shipments consigned to or shipped from distant points from or to a flag station might conceivably be more than those on fifty smaller shipments to or from nearby points, it would be extremely unfair to ask that an agent be appointed in one case while, on the basis of earnings, it would be denied in the other.

The only feasible way of dealing with the matter is that each application should be dealt with on its merits, in view of the different conditions surrounding the establishment of each station, the circumstances inducing its establishment, and the character and extent of the business transacted at it.

Even if the Board has jurisdiction to make the order asked for, that jurisdiction should not be exercised on the present complaint; it was not the intention of the framers of the Act that the actual management of the company's operations should be taken away from its responsible officers except when there is some public necessity for it which has been ascertained by full enquiry after complaint made.

The policy of the legislation is, as laid down in *I. C. C. v. Baltimore & Ohio Ry. Co.*, 43 Fed. Rep. 37, 3 I. Rep. 192, p. 199:

“Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or advantage, or subject to undue prejudice or disadvantage persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits.”

Geo. F. Macdonnell, for the Canadian Northern Ry. Co.

As a general rule the question of the erection of stations or the substitution of regular stations for flag stations or *vice versa* should be left to the discretion of the company concerned. In its own interest a company will naturally establish stations where warranted by the traffic or the probable traffic in order to foster business and increase its earning powers, while a desire to economize would naturally prevent its doing so where it considered the probable traffic insufficient to warrant the expense. A certain degree of credit should be given to the business ability of each company to determine this matter. No hard and fast rule should be made as to the exact dimensions of flag stations or platforms without taking into view the circumstances at each point concerned, and hearing the views of the company with respect to it.

The minimum of business which would justify the erection of a flag station is \$15,000 per annum, as in Minnesota. The admission in the Chief Traffic Officer's report that the Canadian West is less settled than Minnesota is a reason for placing that minimum in the Canadian West at as high, if not a higher, figure. Many of this company's lines are largely colonization lines opening up new country, consequently the traffic will be light for the first few years, and the company should not be asked to burden itself financially with an unnecessarily expensive outlay in the construction of stations.

It is not advisable for the Board to pass any rigid rule forbidding the reduction of regular stations to flag stations or the closing of flag stations, certain stations are established and used purely for the operating purposes of the company, and the company is the only party having any interest in the matter. The business at many stations fluctuates from year to year, and at different periods of the same year, and the company should be given discretion to deal with the business as it finds it.

The only jurisdiction given to the Board under the Railway Act to order the erection of a station must be—

(a) An inference from sub-section 3 of section 258, and this is limited to lines subsidized, as mentioned in that section, so

that a general order as to the erection of stations would be beyond the Board's jurisdiction.

(b) Under section 284, which refers only to the place of starting, the junction with other railways and established stopping places, none of which include flag stations.

And if the Board cannot order the erection of a station it would be illogical to consider that it has the power to prevent a reduction or closing of stations unless specific authority is given. No such specific authority is given in the Act, and the Chief Traffic Officer is in error in considering that the question of the erection, reduction or closing of stations can be included under any of the provisions of the Act as to tariffs.

D'Arcy Tate, for Grand Trunk Pacific Railway Co.

1. The Board has no jurisdiction under section 258 to order the establishment of stations except in the case of railways coming under sub-section 3 of that section. This railway has not been subsidized in money or land by the Parliament of Canada and is not, therefore, one of the companies to which that sub-section applies. If the Board had jurisdiction to compel the erection and maintenance of stations by any railway company, then clearly sub-section 3 would be superfluous.

2. Even if the Board had jurisdiction in the premises, the same should not be exercised so as to make any general or blanket order providing for the erection and maintenance of stations. It is not a practical proposition that a railway company should be bound by any hard and fast rules in regard to service to be provided at stations. Each case should be dealt with on its own merits, and according to the special circumstances surrounding it. Flag stations are specially established for the accommodation of a few patrons of the railway who have a considerable distance to haul their freight to the nearest station where freight is billed, and the railway company cannot be expected to appoint agents and erect expensive buildings at frequent intervals along the line where the traffic does not justify the expenditure.

On 19th May, 1908, the matter came again before the Board at Toronto. Mr. Walsh, for the Canadian Manufacturers' Association appeared for the applicants; E. W. Beatty, for the Canadian Pacific Ry. Co.; W. H. Biggar, K.C., and M. K. Cowan, K.C., for the Grand Trunk Pacific Ry. Co., and Geo. F. Macdonnell, for the Canadian Northern Ry. Co.

Mr. D. McNicoll, Vice-President of the Canadian Pacific Ry. Co., gave evidence pointing out the unreasonable expense without any adequate return which would be incurred by the railway companies if the recommendations of the Chief Traffic Officer in his report were adopted by the Board.

November 2, 1908. THE CHIEF COMMISSIONER:—This matter seems to have been first brought to the attention of the Board at a meeting in Winnipeg in September, 1906, by the Board of Trade of that city, and in February, 1907, a formal complaint was lodged by the applicants.

Several matters are involved in the complainants' petition, and amongst others they ask that the railway companies be ordered to

(1) Where the traffic warrants it, erect a freight shed and appoint a permanent agent in charge of the business at that station.

(2) Not reduce any regular station with an agent in charge to a flag station without an agent.

(3) Not to close any regular or flag station without the approval of this Board.

All the railway companies have taken exception to the jurisdiction of the Board to deal with these matters.

Section 284 sub-section (a) provides that the railway company according to its powers shall: "furnish at the place of starting, and at the junction of the railway with other railways, and at all stopping places established for such purpose, adequate and suitable accommodation for the receiving and loading of all traffic offered for carriage upon the railway."

Sub-section 3 empowers the Board to order such accommodation to be furnished having regard to all proper interests.

Section 258 provides: "Every station of the company shall be erected, operated, and maintained with good and sufficient accommodation and facilities for traffic."

"2. Before the company proceeds to erect any station upon its railway, the location of such station shall be approved of by the Board."

"3. In the case of any railway, whether subject to the legislative authority of the Parliament of Canada or not, subsidized in money or in land, after the eighteenth day of July, one thousand nine hundred, under the authority of an Act of the Parliament of Canada, the payment and acceptance of such subsidy shall be taken to be subject to the covenant or condition, whether expressed or not in any agreement relating to such subsidy, that the company, for the time being owning or operating such railway, shall, when thereto directed by order of the Board, maintain and operate stations, with such accommodation or facilities in connection therewith as are defined by the Board, at such points on the railway as are designated in such order."

It is argued first that because the above sub-section 3 deals specially with railways subsidized after July 18th, 1900, the fair construction of the whole Act is that the powers conferred upon the Board by this sub-section do not exist as to railways not so subsidized. I do not think this contention well grounded. This section, I think, was intended to extend the jurisdiction of the Board, as to the matters covered by it, to railways not subject to the legislative authority of the Parliament of Canada, that is to railways incorporated under Provincial Statutes and which had not been declared to be works for the general advantage of Canada; without this sub-section, the power of the Board would not extend to such railways, whether subsidized either before or after July 18th, 1900.

The second objection is that sub-section (a) of 284 only requires the railway companies to furnish accommodation at

stopping places established for the purpose of "*receiving and loading traffic*," the contention being that "*flag stations*" were used for delivering or unloading and not for "*receiving and loading*."

I do not know that the expression "*flag station*" appears in the statute, but of course it has a well known meaning.

Sub-section (b) of 284 imposes upon the railway companies the duty of furnishing "*adequate*" and suitable accommodation for "*the carrying, unloading, and delivering of all such traffic*." Section 30, sub-section (g) provides that the Board may make orders "*with respect to rolling stock, apparatus, cattle guards, appliances, signals, methods, devices, structures and works, to be used upon the railway, so as to provide means for the due protection of property, the employees of the company, and the public*."

It seems to me perfectly clear that under these sections the railway companies are obliged to provide suitable accommodation for unloading and delivering all traffic, and if they omit so to provide then the Board has power so to order, and in doing so may require the companies to erect and maintain platforms or freight sheds, or any other "*structures or works*" that might be deemed reasonably proper for the protection of property or the public. The statute seems to confer ample power upon the Board to deal with the subject matter of this application.

With respect to the first ground of the complaint, the companies all express their willingness to establish permanent agents "*where the traffic warrants it*." The difficulty is in saying when the traffic warrants such a step. Hitherto this and the other matters involved have been left entirely to the good judgment of those in charge of the management and operation of the railways, and they quite naturally object to interference; but if I am correct in my interpretation of the statute, it is clear that Parliament has placed these matters under the control of the Board, and has imposed upon it the duty of saying when the time has arrived for the appointment of permanent agents,

if that is thought by the Board to be part of furnishing suitable and adequate accommodation for the delivery of traffic. It is also stated by the Chief Traffic Officer that in practice the companies receive freight in carload lots at these stopping points, as well as butter, cheese and eggs, in which event they would be required under sub-section (a) to furnish suitable accommodation for such receiving.

The applicants submit a list of thirty flag stations upon the Canadian Pacific Railway and forty-six upon the Canadian Northern, doubtless now there are many more upon the Grand Trunk Pacific; this matter has been standing so long since originally brought before the Board that the conditions have greatly changed and it is impossible to deal with these stations or stopping places by name and the matter must be disposed of upon general lines.

I have read the evidence and fully considered all the arguments that appear upon the file. I feel myself handicapped by reason of not having been upon the Board during the progress of the proceedings, but am compelled to make the best disposition of the complaint that I am able and deem fair to all concerned. The Operating Assistant to the Chief Traffic Officer, in October, 1907, dealt with the details of establishing accommodation at stopping places, and later on the Chief Traffic Officer, on November 15th, 1907, reported to the Board as then constituted, in some respects agreeing and in others differing from the opinion of the Operating Assistant; both of these reports I have carefully considered, and while I hesitate to set my judgment up against those of far greater experience in these matters, I am unable to say that I agree with either in all respects.

It must be kept steadily in view that it is almost always in the interest of the railway companies to convenience the public as far as possible. Flag stations are established at points for the convenience of those living at inconvenient distances from the regular stations, and if this Board required unreasonable expenditures to be made by the railway companies at once upon the establishing of a flag station, I fear that a large section of

the public might be seriously inconvenienced by the omission to establish such stopping places; it may be that some relief might be had by application to the Board, but I am of opinion that great difficulty would be experienced (assuming there is jurisdiction but as to which I do not decide) in determining when or where a new stopping place should be established without the experience afforded by the receipts and travel to and from an experimental stopping point. For those reasons, I am of opinion that the companies should not be required to establish a heated and lighted station building with a caretaker in charge at these flag stopping points as recommended by the chief traffic officer. On the other hand, I think their practices in the past open to serious comment in omitting to provide any sort of platform for people to alight or stand upon, no sort of shed or shelter of any description to place freight in when discharged at these points, and in leaving goods upon the ground exposed to the elements. It seems to me that some middle course should be adopted that will provide some reasonable accommodation and protection to the public, and at the same time not operate as too great a burden upon the railway companies.

I think it not unreasonable that the companies should, at all stopping places known as flag stations, erect a *suitable shelter or waiting-room which could be used for both freight and passengers; it should be provided with a door and windows*. I would not require a caretaker to be kept, nor would it be reasonable to require this building always to be kept heated or lighted. *There should be some sort of platforms and proper approaches*. If the railway companies are willing to accept the foregoing views, the Board will hear them as to the size of buildings and platforms to be provided. If they desire to appeal from the holding that the Board has jurisdiction, we will delay until such appeal is disposed of before settling these details.

Dealing next with the question of appointing permanent agents at flag stations, as I have said I think the Board has jurisdiction so to order if it deems a permanent agent part of the station equipment necessary to furnish to the public ade-

quate and suitable accommodation for unloading and delivering traffic, or for receiving and loading of traffic, and in this view I am confirmed by the late Chief Commissioner in a memo. of October 11th, 1907, in which he says that the Act requires "the railway company to provide reasonable and proper facilities for receiving, carrying, and delivering traffic, and that while the point has never been decided, it may well be argued that the Board has power to require a company to place and keep an agent at a particular station where, in view of the amount of business to be done and other circumstances this would seem to be a reasonable and proper facility to be afforded."

The question is what amount of traffic warrants the appointment of a permanent agent. I think the Minnesota law not an unreasonable one in this respect. There a total freight and passenger earning of \$15,000 requires the appointment of a permanent agent; and I agree with the recommendations of the Operating Assistant upon this point and think the companies should be required to appoint and maintain permanent agents at stations where the total freight and passenger earnings amount to \$15,000 for the year, and at points where the business consists principally of shipping grain, where such shipments amount to at least 50,000 bushels, agents should be appointed and maintained at such points during the grain shipping season; and at points of shipment where a telegraph operator is located for the handling of trains, such operator should, while he remains at such point, be provided with the necessary equipment to enable him to take care of all traffic at such point. It does not appear to be necessary at this moment to consider the request that the companies be prohibited from reducing a regular station to a stopping point without any agent, or from closing any regular or flag station without the approval of the Board. It is not to be assumed that such step would be taken without good reason, and I think such cases should be left to be dealt with individually when they arise, assuming there is jurisdiction, as to which I express no opinion.

Strong objections are made, and I think with good reason,

to the form of release required for traffic for delivery at flag stations; but I refrain from dealing with this matter as it is now under consideration by the joint committee assembled, pursuant to the request of the Board made in the circular of April last, and will be dealt with by the Board when considering the standard form of shipping bill.

COMMUTATION—UNJUST DISCRIMINATION.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.

WEGANAST V. GRAND TRUNK RY. CO.

(This judgment was received after the report of the case at p. 42.)

December 24, 1908. MR. COMMISSIONER MILLS (dissenting):
—The Grand Trunk Railway Company admits that it has been and is now discriminating against the town of Brampton as compared with the town of Oakville in the matter of commutation tickets.

Discrimination in tolls, or rates, against any person, commodity, or locality, is *primâ facie* unjust, and should be disallowed by the Board of Railway Commissioners, unless facts are stated and reasons given which are sufficient to prove that, under the special circumstances and conditions of any case in question, the difference in treatment “does not amount to an undue preference or an unjust discrimination” (Railway Act, sec. 77).

In every case of a lower toll given to one person, commodity, or locality than is given to another person, commodity, or locality, “under substantially similar circumstances and conditions,” “the burden of proving that such lower toll or difference in treatment does not amount to an undue preference or unjust discrimination, shall lie on the company” (Railway Act, sec. 77).

A great deal of so-called evidence was given in this case; but very little of it bore even remotely upon the point at issue, viz., whether or not the admitted discrimination against Brampton as compared with Oakville in the matter of commutation tickets is just and reasonable. The railway company made an effort to justify the discrimination; but its failure to do so was, in my opinion, most signal and complete. The only witness called in defence was Mr. J. J. Bell, general passenger and ticket agent of the company.

Mr. Bell went at length into an explanation of the reasons why the company had issued commutation tickets to Brampton and other places for a number of years, and why it had ceased to do so, especially in the case of Brampton.

Mr. M. K. Cowan, counsel for the railway company, stated that the commutation tickets were withdrawn from Brampton, because "they had not been taken advantage of;" and Mr. Bell testified that they were withdrawn on account of a demand, backed by a threat, from the business men of the town, because so many Brampton people were availing themselves of the commutation tickets to purchase goods in Toronto. Note Mr. Bell's evidence on this point. Question by Mr. Fullerton: "When you were giving commutation tickets to Brampton, the traffic got so large that it alarmed the Brampton merchants, and they, as you said, put a pistol to your head?" Answer by Mr. Bell: "It got enough for them to get excited;" but, he adds, "it was not the class of traffic the rate was put in to cultivate. It was people doing business and living in Brampton, and coming in daily to the city." Further, question by Mr. Cowan: "Is it possible to bring up a suburban service between here and Brampton by commutation tickets?" Answer by Mr. Bell: "I cannot believe it possible in the conditions existing." Thus the company is represented as withdrawing the commutation tickets from Brampton at the dictation of the business men of the town because so many people were going "daily to the city," and at the same time justifying the withdrawal on the ground that it was then

and is now impossible to develop a reasonably profitable suburban traffic between the town and the city—traffic of the kind which the company desires; but no evidence is given to prove that the admitted discrimination against Brampton is not unjust or unreasonable.

Mr. Bell stated that, after making an experiment with commutation tickets, the company had withdrawn them from certain places, including Brampton, and had decided to continue them at Oakville, because "some people in Oakville, during this experimental stage, had bought homes in the country, that they might have to sacrifice if the cheap rates were withdrawn;" but, further on, he stated that he could not tell how many people living in Oakville were doing business in Toronto when the company decided to continue the tickets to Oakville and withdraw them from Brampton. He was, he said, "just stating the general principle;" but he gave no evidence as to how many then had or now have vested interests in Oakville, neither the number of the people nor the extent of their interests; nor any evidence as to the amount of property which might be sacrificed, especially in view of the fact that there is now an electric line between Oakville and Toronto; nor anything which could be called evidence as to whether or not there were and are similar vested interests in Brampton, from which town there is no competing electric line to Toronto.

The population of Brampton is nearly double that of Oakville; the two towns are practically the same distance from Toronto; Mr. Bell's evidence proves that there was a very considerable amount—to the merchants of Brampton, an alarming amount—of daily traffic between Toronto and Brampton when the commutation tickets were withdrawn; and the evidence of other witnesses examined at the hearing, tends to show, without actually proving, that, with commutation tickets such as those sold to the people of Oakville, the suburban traffic on the Grand Trunk Railway between Brampton and Toronto would be much greater than that on the Grand Trunk Railway between Oakville and Toronto.

I would not at present be disposed to order the issue of any class of tickets which would reduce the revenue of the company; but it was not urged that commutation tickets such as those asked for by Brampton would result in a reduction of revenue. The regular return trip ticket from Brampton to Toronto costs \$1.10; and a 55-trip commutation ticket, good for one month, costs \$7.15. The former is purchased only by people who must, or think they must, travel; and the latter (the cheaper ticket) appeals, not only to those who must do a certain amount of travelling, but also to the much larger number of people who need not travel, but will do so for a consideration—an inducement offered in the way of rate reduction, combined with the possibility of a greater variety of goods and better bargains in buying and selling; but no one can avail himself of the benefit, or supposed benefit, of the cheaper ticket until he has paid the company \$7.15, which is sure income to the company whether the purchaser makes the whole or only a small proportion of the trips within the month covered by the ticket; and so for each succeeding month. Hence it seems almost certain that the use of commutation tickets such as the above, on ordinary trains, without any additional expense for equipment or service, would pay the company better than the use of the ordinary return-trip ticket; and I think this is true wherever the traffic may be—from surrounding towns and villages to Montreal, Quebec, Toronto, Hamilton, London, Ottawa, Kingston, or any other important business centre. I express no opinion as to whether the issue of such commutation tickets, under approved conditions, would benefit the country as a whole; but I am satisfied that it would increase the revenue of the railway companies.

In his evidence regarding the withdrawal of commutation tickets from certain places, Mr. Bell said: "We took the view that it was right to continue to use commutation rates where the ordinary train service made it possible for people to live in the country and come into the city and do their business and go back again at reasonable rates." Now, this is precisely the condition

of things at Brampton. It was clearly proved at the hearing that the present train service on the Grand Trunk at Brampton is adequate, satisfactory, quite equal to that furnished at Oakville; and the council and Board of Trade of Brampton specifically stated that their application was for commutation tickets to be used on the ordinary trains running between Toronto and Brampton—that and nothing more; so, on Mr. Bell's own evidence, it would appear that Brampton should have commutation tickets.

Hence, to sum up, I would say that, as I understand the case, the facts are as follows:—

(1) Complaint was made to the Board by the applicant and other interested parties, alleging that the Grand Trunk Railway Company was discriminating in tolls, or fares, against the town of Brampton as compared with the town of Oakville;

(2) At the hearing of the complaint, the railway company admitted that it was discriminating against the town of Brampton, but not unjustly so—maintaining that the discrimination complained of and admitted was just, fair, and reasonable;

(3) The said railway company completely failed to justify the said discrimination—not having given any evidence which, by the utmost stretch of imagination, could be said to prove that the difference in treatment of the town of Brampton as compared with the town of Oakville, is either just, fair, or reasonable.

Therefore, my judgment is that the Board is under obligation to take such action as may be necessary to remove the discrimination, either by ordering the restoration of commutation tickets to the town of Brampton, or by simply directing the railway company to cease and desist from further discrimination against the said town as compared with the town of Oakville in the matter of commutation tickets.

UNJUST DISCRIMINATION—TARIFFS.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.

WINNIPEG JOBBERS' ASSOCIATION v. CANADIAN PACIFIC RY. CO.

*(Kootenay Rate Case, No. 783.)**Westbound rates—Unjust discrimination between localities—New tariffs—Higher rates—Restoration of former tariffs—Evidence.*

The Winnipeg Jobbers' Association applied to the Board for an order directing the railway company to restore the former Winnipeg Westbound rates to the Kootenay district.

After the judgment in the *British Columbia Pacific Coast Cities v. Canadian Pacific Ry. Co. (Vancouver Interior Rates Case)* 7 Can. Ry. Cas. 125, the company removed the discrimination there found to exist between localities by raising the Winnipeg Westbound rates.

Held, that the application must fail, there being no evidence that these rates were excessive.

THE application was heard at Winnipeg on the 16th and 17th September, 1908.

G. Henderson, K.C., for the Winnipeg Jobbers' Association.

F. H. Chrysler, K.C., and *E. W. Beatty*, for the Canadian Pacific Ry. Co.

September 17, 1908. THE CHIEF COMMISSIONER:—We do not think, Mr. Chrysler, that it is necessary to trouble you in connection with the Kootenay branch of this matter.

Mr. Henderson has very properly admitted that in view of the finding of the Board in connection with the Vancouver Eastbound rates v. Winnipeg Westbound rates, he is not able to further press the complaint.

It is quite apparent that in that proceeding, in which the Winnipeg interests were represented, an attempt was made to attack the then existing Vancouver-Nelson rates, and evidence was given by the railway companies justifying the 85 cent toll. It seems to have been carefully investigated, as the judgment

shews, later on by Mr. Hardwell, who reported that the figures submitted by the railway company were substantially accurate and correct.

The late Chief Commissioner in a very carefully considered opinion, deals with the various features, including the one I have adverted to, and the conclusion was arrived at that it was impossible for the Board to declare that the Eastern tolls out of Vancouver were excessive. The determination of the Board further in that matter was, that the complaint of the Vancouver interests against the Western rates out of Winnipeg, was well-founded; discrimination was found to exist and the railway company was ordered to file a tariff that would remove that discrimination.

Now, Mr. Henderson very properly and candidly admits that if he is not able to successfully attack the Westbound toll out of Manitoba, that the only way the railway company could comply with the order of the Board and remove the discrimination that was found to exist was by raising the Westbound rates from Winnipeg. That the railway company has done, and no evidence has been given that these rates are excessive. I do not say whether they are or are not excessive, but I do say that no evidence has been adduced to that effect.

Counsel has practically admitted that he cannot hope to succeed upon the application as it stands, but he has asked to have it further enlarged to be dealt with later on. My brother Commissioner and I are both of the opinion that the better way to dispose of the matter is to now dismiss the application, giving leave to the applicant, if he so chooses, to file a new application in accordance with the rules of procedure of the Board, in which he must fully detail and set forth whatever grievances he thinks he has and that the Board has power to remedy. The former application was merely a verbal one, taken up I have no doubt in Winnipeg by the late Chief Commissioner, as a matter of convenience. With the leave to the applicant which I have referred to, this present application may be considered refused.

UNJUST DISCRIMINATION—TARIFFS.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.

WINNIPEG JOBBERS' ASSOCIATION V. CANADIAN PACIFIC, CANADIAN
NORTHERN AND GRAND TRUNK PACIFIC RY. COS.

(Winnipeg Rate Case, No. 783.)

Traders' tariffs—Distributing centre—Balances—Through rates—Local rates—Unjust discrimination and undue preference in favour of particular persons and between different localities—Higher tolls for shorter than longer distances—Shorter included in longer—Substantially similar circumstances and conditions—New tariffs—Higher rates—Restoration of former tariffs—Evidence.

The Winnipeg Jobbers' Association applied to the Board for an order directing the Canadian Pacific Ry. Co. to restore the Traders' Tariffs previously existing in Western Canada, from Winnipeg, as a distributing centre, (giving the Winnipeg traders the benefit of the balance of the through rate on re-shipments) instead of the new tariffs recently put in force by the railway company.

Upon a complaint by the Portage La Prairie Board of Trade, the Board had held that this system of traders' tariffs was illegal as being an unjust discrimination and undue preference in favour of particular persons and between different localities, and the charging of higher tolls for a shorter than for a longer distance where the shorter distance is included in the longer.

The railway company complying with the view taken by the Board had substituted the tariffs complained of by the applicants.

Held, that the application must fail, there being no evidence upon which the Board can reduce the rates charged in the existing tariffs to the same sums that were paid by the favoured few under the old traders' tariffs.

The question of whether it would be possible to standardize the Ontario Town Tariffs, making them applicable to the Western Provinces, and whether the Railway Companies can or should be compelled to grant commodity rates out of Winnipeg were reserved.

THE application was heard at Winnipeg on the 16th and 17th days of September, 1908.

The facts are fully stated in the judgments of the Board.

G. Henderson, K.C., appeared for the Winnipeg Jobbers' Association.

F. H. Chrysler, K.C., and E. W. Beatty, appeared for the Canadian Pacific Ry. Co.

G. F. Macdonnell, appeared for the Canadian Northern Ry. Co.

D'Arcy Tate, appeared for the Grand Trunk Pacific Ry. Co.

Mr. Hunter, appeared for the city of Regina.

G. W. Baker, appeared for the Portage La Prairie Board of Trade.

September 17, 1908. THE CHIEF COMMISSIONER:—The main branch of this case has been very fully and completely presented, and so far as the legal questions involved are concerned, I propose to deal with them now.

This matter grows out of a complaint made by the Portage La Prairie Board of Trade. I do not regard it as being a continuation of that matter, but I should have thought that perhaps it had better be regarded as consequent upon the order made by the Board upon the complaint of the Portage La Prairie Board of Trade. That matter was fully considered by the Board, and the late Chief Commissioner gave his reasons in writing. No formal order is said to have issued, but the railway company has attempted to comply with the view taken by the Board. The Railway Act of 1903 brought about this complaint. I do not think it has been stated how long the then existing system had been on foot, but that is immaterial. For the purpose, I presume of establishing Winnipeg as a distributing centre, or at least assisting in that, the railway companies—first the Canadian Pacific Railway Company—adopted this system of giving to Winnipeg traders or wholesalers, the benefit of the balance of the through rate on re-shipments. That was confined to certain persons, who I presume were selected by the company or by some other body, and trade was carried on under these traders' tariffs.

A complaint was brought against this system by the Portage La Prairie Board of Trade, and the contention was raised that this system was discrimination as against localities and discrimination as between individuals. The Board in its judgment pronounced that system to be illegal, and ordered the railway company—or the railway company consented—I think, the late Chief Commissioner says—to file tariffs with a view to eliminating the

objectionable feature. Those tariffs having been filed—the Winnipeg interests being hard hit by them, it is contended—applied to the Board to withhold consent to their going into effect. Those tariffs may be excessive, I do not know whether they are or not, because there is no evidence given that they are excessive. It is said by counsel for the applicants that the Board is bound to find they are excessive, because they have the effect of increasing the former's rates under the tariffs that were held to be illegal because discriminatory.

Now, I do not in any way disapprove of the proposition advanced by Mr. Henderson—and in support of which he cited cases—that where a rate has been in effect with the approval of a railway company and apparently to their satisfaction, if that rate is raised by another tariff, it is incumbent, other things being equal, upon the railway company to shew why the rate should be raised. The cases cited support that principle and it appeals to one as being reasonable. A toll has been established upon which it is presumed a reasonable profit arose to the carrier, and if, without any change in the conditions, the carrier makes up his mind that he will increase the toll, it is only reasonable the carrier should shew why the toll should be increased. But that is not the present case. In this case this traffic was being carried on the railway and the Winnipeg dealer was getting the balance of the through rate. That was declared to be, upon this complaint illegal, because it was preferential and discriminatory in favour of Winnipeg. I do not set that tariff out of my mind for the purposes of comparison, simply because it was declared to be illegal. I set it out of mind because it never was—so far as re-shipments are concerned—regarded by the parties, either the railway company or the shippers, as a local tariff. It was not a local tariff; it was the balance of the through, and I am not aware of any case in which a court has looked to the balance of a through rate as being a reasonable sum to establish as a local rate. We have got no evidence, it seems to me, which would enable us to presume one way or the other with reference to that old rate.

In addition to that—and increasing the difficulties of the position contended for by counsel for the applicants—during the same period that the Winnipeg merchant enjoyed the benefit of the balance of the through rate, there were side by side with that local tariffs in existence, and which people not favoured under the traders' tariffs were compelled to use. It is said now that the new tariffs which have been filed do not raise the rates that were in existence under the old local tariffs and which the general public were compelled to pay. That being so, it seems to me it is idle to argue that the Board, under the authorities that have been cited, is compelled to adopt the old balances of through rates as reasonable local rates under the new tariffs. Mr. Henderson practically admits that there is no other evidence than the presumption that should be drawn from the circumstances he relies on. Taking the view I do, it is quite clear then that there is nothing in this case upon which the Board can put its finger and say: This is an excessive rate. It may be excessive. I do not know as to that; there is no evidence that it is, and the Board cannot act without evidence.

Then, two other branches of the case present themselves, and one is with reference to the granting of commodity rates out of Winnipeg. I understand it is argued to-day or was yesterday for the first time, that that should be granted. It may have been contended for earlier, but I do not know how that is. Mr. Chrysler takes the position that the Board cannot order the railway company to grant every locality and every place a commodity rate. As to that, I am rather inclined to the view that his contention is right. I do not finally dispose of it at the moment, but it seems to me offhand that it is the railway companies that have the right to frame their tariff. The Board does not frame the tariff, and the public does not frame the tariff; the statute gives the railway company the right to frame its tariffs. And while the statute gives certain control over the tolls to the Board of Railway Commissioners, it does not by any means put the Board in the position of being able to in all cases control the carrier in the fixing of his tolls. I am inclined to the view that

the carrier has the right under the statute to name the localities as to which commodity rates may be granted, but as to that, I do not express any conclusive opinion. The matter presenting itself in this way, I only indicate in the meantime what my unconsidered view of it is, so that the question as to the granting of a commodity rate may be regarded as not being disposed of, but reserved for consideration along with the second branch of this application, and which I now shall briefly advert to.

Mr. Hardwell suggested yesterday that the Ontario town tariffs might be taken as a basis for local tariffs applicable to the Western provinces. I do not know to what extent he had previously had an opportunity of considering that question; I do not know yet whether these could be taken as the basis and made applicable to this part of the Dominion. I do not understand that the railway companies would have any serious objection to that being done, provided their revenue was not seriously disturbed. I do not know whether, in order to get reasonable local tariffs throughout the Western provinces, these Ontario tariffs could be built upon, and standardized as Mr. Hardwell suggests, eliminating the features I mentioned which Mr. MacInnes referred to, and taking into consideration the other surrounding conditions, trade conditions of every kind, population, geographical situation, and so on. That is a matter that will require very much more careful consideration than it has been possible for my brother Commissioner or myself to give it since the proposition was first raised by Mr. Hardwell. It is a matter that should also be fully and very carefully considered by the railway traffic experts, and by the business interests that would be affected by the disturbance of a system that has grown up in the Western provinces, and which is different, as was stated, from the system that has been applicable to the older sections of the Dominion. As to whether that should or should not be done, I do not now decide. It is a matter, as I have said, that will require very careful consideration and perhaps discussion.

In the meantime, the conclusion is that it is impossible to grant this application, and by any sort of order bring about the

system that was ordered by the Board to be discontinued upon the application of the Portage La Prairie Board of Trade.

There is no evidence upon which we can reduce these tariffs that have been filed, to the same sums that were paid by the favoured few under the old traders' tariff. There is no evidence upon which we can reduce, by $12\frac{1}{2}$ per cent. as was requested, or by any other percentage, the tolls for the carriage of this traffic.

The case, therefore, in my view, resolves itself into two questions: First, as to whether it is possible under the statute to compel commodity rates or commodity tariffs; and second, whether it would benefit the public to standardize the Ontario tariffs and endeavour to make them applicable to western traffic.

The main application must fail.

These other two questions have grown out of it.

We think it wise that the situation should be dealt with now that it has arisen. We think we should consider whether it is advisable to adopt the suggestion made by Mr. Hardwell, and further to consider whether the Board has jurisdiction to order commodity rates in the manner asked for. It is only right and proper that the Board should observe the facts that have been given in evidence, and deal with the situation, although it was not covered by the original application. So that, while we are refusing the application as framed, we are reserving the two points, viz.: The advisability or the possibility of applying the Ontario town tariffs, standardized and made suitable to the differing conditions, and the possibility of granting the request made for the commodity rates.

October 24, 1907. HON. A. C. KILLAM, CHIEF COMMISSIONER:
—This is a complaint of the Board of Trade of the town of Portage La Prairie, in Manitoba, against a series of special freight tariffs of the Canadian Pacific Railway Company, expressed as "To be used on re-shipments by Winnipeg wholesale houses only to traders doing business at our tributary stations specified herein." The grounds of objection to the tariffs are that these tariffs are illegal inasmuch as they are discriminatory

as between different shippers and different consignees, and also as between different communities.

Evidence was taken in the matter before me alone at Winnipeg, under a special order of the Board. Notice of the taking of this evidence was given to the Winnipeg Board of Trade, that those representing the commercial interests of Winnipeg affected by or interested in the tariffs might have an opportunity of taking part in the proceedings and of taking action which they might desire in support of the tariffs objected to; and the President, the Secretary, and two other members of the Winnipeg Board of Trade attended.

The evidence given before me shewed that no persons, outside of those whose names appeared upon a certain list of wholesale merchants doing business in Winnipeg, could ship goods under the rates mentioned in these tariffs, and that the company had no tariff giving similar rates to other persons or classes, and that the rates, also, were limited to shipments to consignees whose names appeared in certain lists of traders furnished to the railway company's agents at the different points respectively. The evidence further shewed that shipments made by or to others than the parties named in these respective lists were governed generally by the rates in the ordinary mileage tariffs of the company, which were considerably higher than the rates in the tariffs objected to. The evidence further shewed that there was no tariff of a similar description for shipments by similar classes of persons from Portage La Prairie, but that such shipments were governed by the ordinary mileage tariffs under which the rates were higher for proportionate distances. *It further shewed that, in some instances, the rates from Winnipeg under the tariffs objected to, were lower than those charged from Portage La Prairie to points Westward therefrom, although the goods were carried over the same routes from Portage La Prairie in addition to the distance from Winnipeg to Portage La Prairie. The evidence also shewed that, in many cases, the rates from Winnipeg to Portage La Prairie under these tariffs were much less for the same classes of goods than those from Portage La Prairie to Winnipeg.*

Opportunity was given, both to the railway company and the Winnipeg Board of Trade, to discuss the subject and to offer any remarks or arguments which they might desire to make in regard to the complaint.

While counsel for the railway company did, to some extent, contend that the tariffs were justified by the conditions existing, when they were originally framed, no real argument in support of them was made. The gentlemen of the Board of Trade were informed that if, after further consideration and taking legal advice, they desired to offer anything in support of the tariffs, it would be considered by the Board. They did state that, as these tariffs had been established for a considerable length of time and business had been transacted under them, it would be unfair and would cause too much disturbance in business to have them suddenly abrogated. All this occurred some two months ago, and no communication has since been received from the Winnipeg Board of Trade.

While refusing at the time to express an opinion upon the subject, I warned the parties that it would be advisable that they should prepare for a change. Ample opportunity has now been given for the purpose, and I have been informed by the Assistant Freight Traffic Manager of the railroad company that the company is prepared to substitute by the 15th November next new tariffs which would not be open to the objections put forward in this complaint.

In my opinion the objections to the tariffs are well founded; they appear to me to be contrary to the provisions of the Railway Act prohibiting undue or unreasonable preferences in favour of particular persons and unjust discriminations between different localities and the charging of higher tolls for a shorter than for a longer distance where the shorter distance is included in the longer, and which require that all tolls shall always, under substantially similar circumstances and conditions in respect of traffic of the same description, etc., be charged equally to all persons.

In my opinion the parties interested should be notified that

the Board considers that these tariffs are contrary to the provisions of the Railway Act and that they will be disallowed, and that the railway company should, not later than the 15th day of November next, file and put in force other tariffs in lieu of those complained of.

I think it advisable that the Board should not, in this instance, determine the rates to be substituted, as much delay would be involved in making the necessary inquiries; but that it will be sufficient to disallow these tariffs, allowing the company to substitute new ones, which may be made the subject of complaint if found to be unjust to any interests.

RATES—MAIN AND BRANCH LINE TRAFFIC.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.

MALKIN & SONS v. GRAND TRUNK RY. CO.

(*Tan Bark Rates Case No. 583*).

Group rates—Common points—Main and branch line traffic—Similar circumstances—Unjust discrimination—Railway Act, sec. 315.

On a complaint that higher rates were charged from a point on a branch line for a shorter distance than from points on the main line to the same point thereby constituting unjust discrimination between different localities within the provisions of section 315 of the Railway Act.

Held, that traffic originating on a branch line is not carried to a certain point under similar conditions to traffic originating on the main line carried to the same point until the junction of the branch line with the main line is reached. *Almonte Knitting Co. v. Canadian Pacific and Michigan Central Ry. Cos.*, 3 Can. Ry. Cas. 441. followed.

The rates complained of were equal for a group of common points on the main line.

Held, that although group rates of necessity result in a certain amount of discrimination, so long as such discrimination is not undue it is not unreasonable. *Desel Boettcher Co. v. Kansas City Southern Ry. Co.*, 12 I.C. Rep. p. 222.

Held, also, that the difference in the rates complained of did not constitute undue discrimination within the different sections.

Mr. Commissioner Mills dissented, holding that unjust discrimination had been shewn.

THIS application was heard at Toronto on 20th May, 1908.

W. A. Boys, appeared for the applicants, *J. Malkin & Sons*.
M. K. Cowan, K.C., appeared for the Grand Trunk Ry. Co.

The facts are fully stated in the judgment of Mr. Commissioner McLean.

November 28, 1908. MR. COMMISSIONER McLEAN:—In this case it was complained that the Grand Trunk charged higher rates on tan bark from Sprucedale than from Burk's Falls and Sundridge: these three stations all being on the lines of the Grand Trunk Railway. Sprucedale is eleven miles west of Scotia Junction on what was formerly known as the Canada Atlantic Railway, a line which is now controlled by the Grand Trunk by stock ownership. Burk's Falls and Sundridge are 10 and 21 miles, respectively, north of Scotia Junction on the main line of the Grand Trunk Railway.

The essential points of the complaint may be indicated by a consideration of the distances and rates involved in the shipments to one of the points consuming tan bark:

	Miles	Special commodity rate.
To Berlin		
From Burk's Falls.....	201	8 cents.
From Sundridge	212	8 cents.
From Sprucedale	202	10 cents.

It is alleged that this is proof of an unjust discrimination against Sprucedale.

It was shewn in evidence that from all points within a zone extending from Kearney a short distance east of Scotia Junction to Depot Harbor, a distance of some 58 miles, there was a group rate on tan bark. For example, all points within this group paid 10 cents per 100 lbs. in carload shipments to Berlin. The applicant, Malkin, stated in evidence (vol. 62, p. 3734) that what he especially objected to was this grouping. Counsel for the applicant also urged that Sprucedale should be given a lower rate than the further distance points included in the same group.

It was contended by the respondents that while the Grand Trunk Railway controls and operates what was formerly the Canada Atlantic Railway, the latter company still retains its legal identity, and that substantially the same relations should exist between the two companies at present, in respect of the division of the through rates, as existed before the unification of control and management took place. This is not material as an answer to an allegation of discrimination.

It is established that there has been a material reduction of rates. When the Canada Atlantic was operated as a separate railway, the rate on tan bark from Sprucedale to Berlin, to take one of the points affected, was 11 cents; when the Grand Trunk obtained control of this line in 1905 the rate was reduced to 10 cents, and the rate was further reduced on March 7th, 1908, to 9 cents, a reduction of approximately 18 per cent. in the period in question.

The central point in the complaint is one of group rates complicated by consideration of main line and branch line traffic. Group rates of necessity result in a certain amount of discrimination; so long as the discrimination is not undue, such rates are not unlawful. *Desel-Boettcher Co. v. Kansas City Southern Ry Co.*, 12 I.C. Rep., p. 222.

So far as the complaint regarding the Kearney-Depot Harbor group is concerned, this was met by the issue of a special freight tariff (Sup. 13 to C.R.C. No. E. 517) which broke up this group and gave Sprucedale the advantage of its proximity to the junction point.

While under existing tariff conditions the Sprucedale rate is 9 cents and the Burk's Falls rate 8 cents, the difference in rate is not conclusive as regards the question of discrimination.

Counsel for the applicant holds (see evidence, vol. 62, p. 3730) that this is a discrimination which is forbidden under subsection 4 of section 315, which states that: "No toll shall be charged which unjustly discriminates between different localities."

In the application of section 315, sub-sections 1 and 5 afford certain tests which are to be used by the Board as criteria of discrimination. These are inequality of tolls in respect of any or all of the following conditions:

1. Under substantially similar circumstances and conditions.
2. In respect of all traffic of the same description.
3. In respect of all traffic of the same description carried on or upon the like kind of cars.
4. Passing over the same portion of the line of railway.
5. Like description of goods carried under substantially similar circumstances and conditions in the same direction, over the same line, a greater charge being made for a shorter than for a longer distance, the shorter being included in the longer.

The tests which are applicable to the facts of the case are the first and fourth.

(1.) *Substantially similar circumstances and conditions.*

The traffic concerned originates on a branch line. The Board has recognized that branch line freight rates may be on a higher basis than main line freight rates to shorter distance points, so long as the rates are not unreasonably or disproportionately higher. *Almonte Knitting Co. v. Canadian Pacific & Michigan Central Ry. Cos.*, 3 Can. Ry. Cas. 441.

Inferentially it is justifiable to apply the same principle in respect of traffic originating on a branch line. This establishes an initial dissimilarity of circumstances.

While not holding that the entire cost of the upkeep of a particular branch line, division, or other portion of a railway must in every case come from the receipts of such portion, it must at the same time be recognized that each ton or passenger moving over such portion must, if the traffic is light, contribute a proportionately higher amount per unit to such upkeep than in the case of a portion of line where the traffic density is greater. The lighter traffic on what was known as the Canada Atlantic is a material fact.

(2.) *Traffic passing over the same portion of the line of railway.*

It is apparent that in so far as the passing of the commodities over the "same portion" of line is concerned there is an initial dissimilarity of circumstances which does not disappear until the junction point is reached.

It does not appear that the difference in rates now existing as between Sprucedale and Burk's Falls brings the complaint within the provisions of section 315 of the Railway Act, and judgment should therefore be given against the applicant.

THE CHIEF COMMISSIONER:—I agree.

December 7, 1908. MR. COMMISSIONER MILLS (dissenting):—Having to dissent from the judgment in this case, I wish to state briefly my reasons for doing so. ◆

Regarding branch lines of railway, it is alleged in this judgment that, unless in exceptional instances, "it must be recognized that each ton or passenger moving over such portion (that is, over a branch line) must, if the traffic is light, contribute a proportionably higher amount per unit to such upkeep (the upkeep of the branch line) than in the case of a portion of the line where the traffic density is greater, *'each ton or passenger must contribute a proportionably higher amount'*"; and then, on this ground alone, it is held not to be unjust, in other words, that it is fair and reasonable, to charge a considerably higher rate on traffic which originates on a branch line, than is charged on the like traffic when it originates on a main line, in the same locality, and is carried the same distance—even a greater distance—to the same destination, the former being carried 16-17 and the later 17-17 of the total distance (202 miles) over the main line.

Now, referring to the above *dictum* regarding branch line traffic, I might ask whether it is right to assume that branch lines which, owing to lighter traffic or other causes, shew less direct profit than the main line (perhaps not much over the cost of operation and maintenance) do not make a reasonable return to the company, and conclude that as a consequence

the traffic (every ton of freight and every passenger) moving on such branch lines "must" be made to pay higher rates than are paid for like traffic on the main line? Is it not a fact that the capital invested in branch lines is generally much less per mile than that invested in the main line—less expensive bridges, comparatively inferior road-beds with sharper curves made to save expense, lighter rails, less expensive stations, lighter engines, and less valuable passenger cars? Is it not also a fact that the service on branch lines is nearly always less frequent, less regular, and worth less than that on the main line? Branch lines figured alone may not make a very good shewing, but they may nevertheless pay well as feeders to the main line; and without such feeders the profits on many main lines would be greatly reduced.

If this doctrine regarding the traffic on branch lines is sound, it follows that the Board ought to rescind or vary the order of the late Chief Commissioner fixing the passenger fares to be charged by our railway companies at three cents per mile on all lines, including every branch line, operated in any part of the Dominion between Calgary and the Atlantic Ocean; and the said companies should at once be authorized to issue higher and different tariffs, both freight and passenger, for many, perhaps most, of their branch lines, varying them from time to time so that they shall always be inversely proportional to the traffic on each branch compared with that on the main line.

The main line of the Grand Trunk Railway runs from Montreal to Toronto and on, west, to Sarnia; and many branches run off from it in different directions, among which are a portion of what was known as the Canada Atlantic, extending from Coteau on the main line, a distance of 339 miles, to Depot Harbor, and the branch running from Toronto, north, a distance of 227 miles, to North Bay. The later branch crosses the former at Scotia Junction; and, in the immediate vicinity of the said junction, there are three places from which tan bark is shipped to, say, Berlin, Ont., namely, Sprucedale, on the Canada Atlantic branch, 202 miles from Berlin; Burk's Falls, on the North Bay

branch, 201 miles from Berlin; and Sundridge, on the North Bay branch, 212 miles from Berlin—all in a group; and, in making rates under the group system, the fundamental point is that all shippers in the same group shall, regardless of distances, be charged the same rate to common markets, in order that, so far as freight charges are concerned, no one in the group will be at a disadvantage in the markets to which they all ship.

In this case, the rate on tan bark from Sprucedale to Berlin is 9 cents per 100 lbs., while that from Burk's Falls and from Sundridge to Berlin is 8 cents per 100 lbs.; that is, a shipper at Sprucedale is charged $12\frac{1}{2}$ per cent. more on a carload of tan bark shipped to Berlin, than a shipper at Burk's Falls is charged on a carload of the same commodity, shipped by the same railway, the same distance, to the same destination, and $12\frac{1}{2}$ per cent. more than is charged on a like shipment from Sundridge, 10 miles farther, to the same destination. This is an undoubted discrimination against Sprucedale; and in the judgment of my colleagues it is admitted to be a discrimination; but it is held not to be unjust,—in other words, it is justified and approved,—simply and solely on the ground that traffic from Sprucedale originates on a branch line and is carried 11 miles out of 202 miles on a branch line, while traffic from Burk's Falls and from Sundridge originates on and is carried all the way on a so-called main line (the North Bay branch); therefore, it is held to be just, fair, and reasonable to charge Sprucedale $12\frac{1}{2}$ per cent. more for a given service than is charged to Burk's Falls and Sundridge for the same or a greater service,—in spite of the practice of the company at Allandale, on the same line, in dealing with traffic from the Collingwood and Penetanguishene branches, and at a large number of other junction points where there is no extra charge on traffic from branch lines, even when the said traffic is carried for long distances over branch lines.

Speaking for myself, I can only say, in the language of the Chief Traffic Officer of the Board, that "I am unable to see any

exceptional conditions to justify a higher rate from Sprucedale'' than from Burk's Falls and Sundridge. Hence I cannot concur in the judgment of Mr. Commissioner McLean, which is based upon what appears to me to be a strained interpretation of two phrases in section 315 of the Railway Act. The judgment was a surprise to me; and, if followed in subsequent judgments, it will undoubtedly benefit persons who live near main lines of railway, and result in serious injury to those who have to travel and do most of their shipping on branch lines.

I say nothing about the reasonableness or unreasonableness of the rates in themselves,—9 cents per 100 lbs. from one of the places in question, and 8 cents per 100 lbs. from the other two places: 8 cents or $8\frac{1}{2}$ cents might be or might not be a fair and reasonable rate from the three places. The evidence on the point is very meagre. Hence I do not feel warranted in expressing an opinion; but my judgment is that a discrimination of $12\frac{1}{2}$ per cent. against Sprucedale—because it has to ship 11 miles out of 202 miles, or a little less than one-seventeenth of the total distance to destination, over a branch line—is unjust; and that the railway company should be required to cease and desist from charging persons who ship from Sprucedale a higher rate than it charges persons who ship from Burk's Falls or Sundridge, the same or a greater distance, to the same destination.

CONTRACT—UNDERCROSSING.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.]

STILES V. CANADIAN PACIFIC RY. CO.

(Case No. 1141.)

*Contract — Undercrossing — Suitable farm crossing — Farm operations —
Sections 252, 253 Railway Act.*

An application was made to the Board under sections 252 and 253 of the Railway Act for an order directing the Canadian Pacific Ry. Co. to provide and construct a suitable farm crossing.

The applicant complained that the present undercrossing was too small to carry on properly his farming operations, and applied to have it enlarged. *Held*, that the application must be refused, the railway company having carried out their contract in regard to the undercrossing.

THE application was heard at Toronto on 27th January, 1909.

C. A. Moss, appeared for the applicant. The applicant who desires to farm his land in the ordinary way is entitled to ordinary facilities. The only passage is this undercrossing. If it was 12 feet wide 20 years ago, and we need one now 14 feet wide, we are entitled to have it. We are not embarrassed by estoppel or waiver. As the necessities of the community increase so must the facilities over the railway increase. If it becomes necessary in modern farming to use larger implements than were used before, the Board are not to say that the farmers cannot have any wider gates than they have got, and no greater facilities than they have. If this is the only crossing we were entitled to under the contract, then apart from the contract we have the right to a proper and convenient crossing over the railway.

Angus MacMurchy, K.C., appeared for the Canadian Pacific Ry. Co.

January 27, 1909. THE CHIEF COMMISSIONER:—If we were dealing with this matter under the plan Mr. Moss has just referred to, and giving a crossing where one had not previously been in existence, it might be reasonable to provide a crossing 14 feet in width, and possibly 14 feet in height, if the cost of constructing such a subway was not prohibitive, bearing in mind the value of the property. But that is not this case. We have a case here of a railway company, in 1889, entering into a contract to construct and maintain an undercrossing. That crossing was completed 12 feet by 12 feet, and the man used it for 18 years, and so far as the railway company were concerned no complaints were made to it that it was not perfectly satisfactory. It would be entirely unreasonable it seems to me, to disturb the order of things which were apparently satisfactory to the man

with whom the contract was made. Under the circumstances we think the contract was fulfilled by the construction of the crossing, and the contract as fulfilled in that way was satisfactory to the then owner of the property, and the present owner of course can take no higher position than his predecessor in title.

Under these circumstances we think the application must be refused, but an order may go requiring the railway company to enlarge this to a 12 foot crossing, by 12 feet in height, and to continue the maintenance of it as the contract calls for.

INTERSWITCHING CHARGES—REFUND.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.

LIDLAW LUMBER CO. v. GRAND TRUNK RY. CO.

(Case No. 1356.)

Charges for interswitching collected prior to 1st September, 1908, although paid under protest, cannot be recovered back.
Canadian Manufacturers' Association v. Canadian Freight Association, 7 Can. Ry. Cas. 302, referred to.
Dominion Concrete Co. v. Canadian Pacific Ry. Co., 6 Can. Ry. Cas. 514, followed.

THE Laidlaw Lumber Co. applied for an order directing the Grand Trunk Ry. Co. to refund certain switching charges collected by that company prior to September 1st, 1908, the date on which the company's interswitching tariff No. C. R. C. 1380 became effective.

The application was heard at Toronto on 13th November, 1908.

W. Laidlaw, K.C., appeared for the applicant.

M. K. Cowan, K.C., appeared for the Grand Trunk Ry. Co.

The original application was filed in April, 1907, and partly heard in November, 1907. It was contended for the applicant that the order of the Board made on 8th July, 1908, see pp. 332-335, 7 Can. Ry. Cas., was declaratory and related back to the time at which the complaint was filed—the charges were paid under protest and should be refunded—the railway company had no lawful right to collect any tolls at all except under an order made by the Board.

December 1, 1908. MR. COMMISSIONER McLEAN:—The decision of the Board in this case must be governed by the decision in the *Joint Switching Rates Case* (Case No. 182); *Canadian Manufacturers' Association v. Canadian Freight Association*, 7 Can. Ry. Cas. 302.

While the question of interswitching was dealt with in the *London Case: Grand Trunk Ry. Co. v. Canadian Pacific Ry. Co.*, and *City of London*, 6 Can. Ry. Cas. 327, the Board was careful to limit itself to the mere facts of the particular case before it. For it refused to deal in a general way with the question of the division of interswitching rates in reference to all the points in Canada where the railways of the two companies concerned connected.

It is admitted in case 182, that it had, for a considerable period, been the practice of the railways in Toronto to absorb the interswitching charges. In the hearing at Toronto it was suggested that the applicant company had furnished antecedent consideration for the continuation of the practice of absorption. This was, however, by the way and not material. In addition the late Chief Commissioner held that the existence of such a practice of absorption for a period of time did not preclude railways changing the practice: *Canadian Manufacturers' Association v. Canadian Freight Association*, *ut supra*, 308.

In the absence of a joint tariff, including the switching charges, it was open to the railway to charge its standard tariff, and in addition thereto switching rates. *Ibid.*, 306, 308.

While a comparatively sudden change from the practice of absorption of the switching charges to a practice of charging the shippers for the switching services may have been arbitrary, the railway was within its legal right in so acting.

It is alleged that the interswitching tariff of the Grand Trunk, effective March 1st, 1907, was simply a tariff as between the railways and not having been properly filed was illegal. While it was advisable that switching tariffs should be filed with the Board, the non-filing of such tariffs was not illegal prior to the issue of the order of July 8th, 1908, by the Board: *Ibid.*, 308.

While the Board may require the two railway companies to treat traffic involving interswitching as joint traffic, it was not illegal, in the absence of the filing of a joint tariff, covering switching services, for the railway to charge an additional sum for its switching services which are something distinct from the ordinary work of transportation, although such switching charges might not have been filed. The argument then from the switching tariff, as between the railways themselves, fails.

Under an order of the Board of July 8th, 1908, effective September 1st, 1908, there were established regulations in regard to the switching charges on traffic both competitive and non-competitive. The applicant claims that in so far as the interswitching rates charged by the railways were in excess of those established by the order of the Board, there should be a refund. The first portion of the complaint of the applicant, namely, that dealing with the conditions under the tariff effective March 1st, 1907, has already been dealt with. There is no complaint that the Grand Trunk tariff, effective June 5th, 1907, was not properly filed, or that it did not properly notify the public. While the subsequent order of the Board did reduce the switching rates on non-competitive traffic, the Board has no power to make a retroactive alteration in a tariff, which is not contrary to any of the provisions of the Railway Act, so as to apply the alteration to past transactions: *Dominion Concrete Co. v. Canadian Pacific Ry. Co.*, 6 Can. Ry. Cas. 514.

It is clear that the law in regard to interswitching had been in an inchoate condition. The order of July 8th, 1908, was the outcome of a series of investigations and reports which dates as far back as 1904. In view of this and of the established policy of the Board in regard to refunds, it is impossible to grant any such retroactive order as is asked for, and the complaint of the applicant should, therefore, be dismissed.

THE CHIEF COMMISSIONER:—I agree.

NOTE.

Upon application to the Board leave was granted to appeal to the Supreme Court of Canada on 28th January, 1909.

JURISDICTION OF THE BOARD—CONNECTION OF RAILWAYS.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.

BOARDS OF TRADE OF GALT, PRESTON, HESPELER, WATERLOO, BERLIN.

V.

GRAND TRUNK, CANADIAN PACIFIC, BERLIN, WATERLOO, WELLESLEY & LAKE HURON, PRESTON & BERLIN, GALT, PRESTON & HESPELER RY. COS.

(Case No. 910).

Jurisdiction of the Board—Dominion railway—Provincially incorporated railway—Line of Dominion railway—Crossing—Connection—Sections 3, 8, Railway Act—3 Edw. VII. ch. 84 (C.)—4 Edw. VII. ch. 47 (C.).

The Board has no jurisdiction to order a connection to be made or traffic to be interchanged between a Dominion railway and a provincially incorporated railway which it crosses, such provincial railway not having been declared a work for the general advantage of Canada. Under sec. 8 of the Railway Act the jurisdiction of the Board is confined to the point of crossing, and does not extend to the whole line of the provincial railway.

Where a railway company incorporated by the Parliament of Canada was authorized to acquire two provincially incorporated railways but no work had been done in connection with such railway, and the validating Act provided that the acquisition should not make such railways subject to the Railway Act, 1903, or works for the general advantage of Canada, but that they should remain subject to the legislative control of the Province.

Held, 1. That under section 3, the special Provincial Act overrides the Railway Act.

2. That there is no jurisdiction to authorize making connections with or affording facilities to a Dominion railway which does not exist, and an order requiring such connection to be made would be in effect ordering a provincial railway to connect with a Dominion railway, as to which the Board has no jurisdiction.

THE application was heard at Toronto on November 16th, 1908.

C. N. Hanning, for Berlin, Waterloo, Wellesley & Lake Huron Ry. Co.

E. W. Clement, for the Town of Berlin.

M. K. Cowan, K.C., for the Grand Trunk Ry. Co.

E. W. Beatty, for Canadian Pacific Ry. Co.

J. H. Hancock, for the Boards of Trade, the applicants.

The facts are fully set out in the judgment of the Chief Commissioner.

November 16, 1908. **THE CHIEF COMMISSIONER**:—It seems to me this matter is very plain. I see no reason why it should not be disposed of now.

With the merits of the application of course we do not deal.

Counsel has referred to how beneficial in his view an inter-switching arrangement of this sort would be for the railways concerned, and to the towns interested, and to the industries located there. That may or may not be the fact. However, it is quite immaterial whether it would be beneficial to the carriers or to the industries. The initial step for us to consider is whether this statutory tribunal has jurisdiction to grant this application. Counsel agreed the other day that the question of jurisdiction should be dealt with, and if the opinion we form is erroneous upon that point, the Railway Act gives the applicants power to go to the Supreme Court, if they get leave to do so from a Judge of the Supreme Court, and we will be put right, if we are wrong.

In the meantime it seems to me perfectly clear that this Board has no jurisdiction to grant this application.

The facts briefly are that the Galt, Preston & Hespeler (an Electric Ry. Co.) was incorporated by Ontario Letters Patent. It operates between Galt and Hespeler via Preston.

Then another railway incorporated also by Letters Patent granted in the Province of Ontario, operates between Preston and Berlin.

These roads have been for some years in operation, both of them provincial corporations, neither of them ever having been declared works for the general advantage of Canada.

Then another charter or Special Act exists incorporating what is called the Berlin, Waterloo, Wellesley & Lake Huron Ry. Co., 3 Edw. VII. ch. 84, authorizing that railway to construct through to Waterloo and to some other point northerly in the county of Waterloo. That Act has never been taken advantage of in the way of construction work. It is said that the right to construct has expired.

Then when this application came up, objection was raised to the jurisdiction of this Board to make the interswitching orders asked for. And, later on, under the authority of 4 Edw. VII. ch. 47, the Berlin, Waterloo, Wellesley & Lake Huron Railway Company acquired the two provincial electric roads, the Galt, Preston & Hespeler, and the Preston & Berlin Railway Companies. The former company acquired these two electric railways under the authority conferred upon it by the Act of 1904. That Act, section 3, provided that the acquisition of those two electric railways by the Berlin, Waterloo, Wellesley & Lake Huron Ry. Co. should not have the effect of subjecting those two electric railways to the jurisdiction of this Board, or to the Railway Act of 1903, which has since been superseded by the Act of 1906, and the amendment.

Now, it seems to me perfectly clear that those two railways are still corporate entities, and are still under the jurisdiction of the Ontario Legislature, and the control of the Ontario Railway

Board. The right to purchase the two electric railways, conferred by the Parliament of Canada upon the Berlin, Waterloo, Wellesley & Lake Huron Railway Company, could only be pursuant to the terms of the Act granting the power. That Act, as I have said, preserves the entity and provincial control of the two electric railways, and expressly provides that the acquisition of these two roads should not bring them under the jurisdiction of the Parliament of Canada, or of this Board.

Now then, unless there is something in the Railway Act overriding that special provision, it must follow to my mind beyond any question, that these railways remain where the Parliament of Canada said they should remain.

Then, it is contended that under section 8 of the Railway Act, this Board has jurisdiction over these two electric roads because they cross in these different towns the line of the Grand Trunk and the Canadian Pacific, which are both federal roads, and subject to the jurisdiction of this Board.

Section 8 gives this Board limited control or limited jurisdiction over provincial corporations. If the provincial corporation, as I understand it, is connected with a Dominion road, or a road under the jurisdiction of the Parliament of Canada, then this Board, for certain purposes, has jurisdiction over it. There is no connection in this case. There are crossings, but the only jurisdiction that this Board has over a provincial road where it crosses a federal road is at the identical point of crossing. We have no further jurisdiction than, for instance, to make provision for protective appliances, and things of that sort, and the mere fact that an electric road, or a provincially incorporated road, crosses a road incorporated by the Parliament of Canada, does not give this Board jurisdiction over the whole line of that railway, but merely over the point at which the crossing is made.

So that to my mind section 8 does not in any way assist the applicants. If it did, section 3, it seems to me, would entirely prevent the Board considering the application. I read them during the discussion, and we find, applying section 3 to this situation, that in the Special Act there is a distinct provision which

I have referred to relating to the same subject matter that the General Act refers or relates to, and in that event, under the provisions of section 3, the provisions of the Special Act shall, in so far as necessary to give effect to the Special Act, be taken to override the provisions of the General Act. So that although the provisions of the General Act might in some view of it be applicable to the jurisdiction in some instances, still we have this Special Act distinctly overriding the provisions of the Act with reference to the subject-matter of the application, going to the root of the application, namely, as to where the jurisdiction over these two electric roads is.

It does not seem to me, in any view of the matter, that this Board has jurisdiction to order the Grand Trunk to connect with the electric roads, either at Galt, Preston or Hespeler.

Then it is suggested that because the Berlin, Waterloo, Wellesley & Lake Huron Railway Company is a federally incorporated body, an order may be made requiring it to make a connection with the Grand Trunk at Berlin. It does not appear to me that the jurisdiction of the Railway Act applies for the purposes of making connections, and affording facilities, where a road is not in existence. No work has ever been done in connection with the Berlin, Waterloo, Wellesley & Lake Huron Railway. It is in existence only upon paper. It is said the time has gone by within which it could construct. If we made an order requiring it to connect its line with the Grand Trunk, it would be a mere subterfuge, it would be in effect ordering the provincial road to make its connection with the federal road, and as to that it seems to me we have no jurisdiction.

I am unable to see in any aspect of the case how the matter has been furthered by what has been done since this matter was first discussed at Hamilton.

For these reasons I think the application fails.

JURISDICTION OF THE BOARD—CONTRACT.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.

DIGNAM V. BELL TELEPHONE CO.

(Case No. 1067.)

Jurisdiction of the Board—Telephone service—Subscriber—Contract—Directory of subscribers—Right to.

D., a subscriber in the city of Toronto, in the Province of Ontario, to the telephone service of the respondent, applied to the Board for an order directing the respondent to furnish him with a copy of their official telephone directory containing the list of their subscribers in the towns in Western Ontario. There was no provision in the contract between D. and the respondent entitling him to be supplied with such directories in or outside of the city of Toronto, although it is the practice of the respondent to furnish their subscribers with directories in their own districts.

Held, 1. That the Board has no jurisdiction under the statute (Railway Act and amendments) to grant the application.

2. Upon the evidence it is unreasonable that subscribers in certain districts should be furnished with directories printed for and furnished to subscribers in other districts.

THE application was heard at Toronto on the 12th and 13th of November, 1908.

J. S. Dignam, the applicant, appeared in person.

D. T. Symons, K.C., appeared for the Bell Telephone Co.

The facts are fully set out in the judgment of the Chief Commissioner.

November 13, 1908. THE CHIEF COMMISSIONER:—We are all of the opinion that this is not a matter that falls within the statute conferring jurisdiction upon this Board.

It appears that the applicant has a contract with the telephone company, and ordinarily that contract would be looked at for the purpose of ascertaining the rights that he might have in connection with the use of his telephone, the price to be paid,

the service and facilities to be afforded, and so on. It is admitted that in this contract on foot between the applicant and the telephone company, there is no provision under which the applicant has any right as against the company to be supplied with directories either in or outside the city. It also appears that it is the telephone company's practice to furnish the city subscribers with city directories, but that it is not the practice to supply to city subscribers directories covering the subscribers outside the city.

The reasons advanced by Mr. Dunstan appeal to one as being founded upon common sense too. It seems that in Western Ontario the towns are grouped, and one directory is issued, copies of those are circulated among all subscribers in Western Ontario. The same thing applies to Central Ontario, Eastern Ontario, Quebec and to the city of Montreal.

There is nothing in the contract, nor is there anything in the statute, requiring the telephone company to furnish subscribers in Toronto with lists of subscribers either in Eastern, Western or Central Ontario.

So that there is no basis upon which the Board could found an order, even if there were jurisdiction so to do, because it does not seem reasonable that the company should be required to furnish city subscribers with these outside directories, thereby entailing upon the company the necessity of calling them all in every six months, or in the event of leaving them out, having their service locked up by errors arising by reason of these directories becoming obsolete, changes in subscribers, new ones coming in and old ones going out.

Then with reference to the ground of complaint advanced by Mr. Dignam, of someone in the telephone office, messenger, or some person of that sort, bringing him one directory, and promising to bring another. It does not seem to me that is a matter the Board could deal with at all. I say nothing with reference to the branch of the case about the directory being withheld on account of the alleged user of Captain Melville's telephone by the applicant. If the applicant had a right to get the Western Ontario

directory, the telephone company would have no right to withhold it by reason of the applicant having used someone else's telephone. It would be open to the telephone company to take such steps as they might see fit in some other forum, but it is sufficient to dispose of this case by simply saying that, in the first place, there is no jurisdiction; in the second place, even if there had been jurisdiction it does not appeal to us that subscribers in certain districts would be entitled to directories printed for and furnished to subscribers in other districts.

JURISDICTION OF THE BOARD—AGREEMENT.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.

BAY OF QUINTE RY. CO. V. KINGSTON & PEMBROKE RY. CO.

(Case No. 1127.)

Jurisdiction of the Board—Agreement validated by Special Act—Compensation—Running rights—Arbitration—52 Vict. ch. 77—Railway Act, secs. 3, 30(h), 176, 364.

The Bay of Quinte Ry. Co. applied to the Board under section 364 of the Railway Act, or any other pertinent section for an order directing the Kingston & Pembroke Ry. Co. to ascertain and settle the compensation payable by the applicant to the respondent in respect to the running rights possessed by the applicant over a portion of the Kingston & Pembroke Railway.

By an agreement between the parties, validated by statute 52 Vict. ch. 77 (D.) such compensation in case of dispute was to be settled by arbitration.

Held, that the Board had no jurisdiction to entertain the application.

THE application was heard at Ottawa on 12th day of January, 1909. The facts are stated in the headnote and judgment of the Chief Commissioner.

C. A. Masten, K.C., for the applicant.

E. W. Beatty, for the Canadian Pacific Ry. Co.

C. A. Masten, K.C. There is jurisdiction in this Board under sections 30 (*h*) and 176 of the Railway Act. That jurisdiction is not ousted by anything contained in the Special Act. There are, therefore, two tribunals by which the substantive rights of these parties may be determined.

E. W. Beatty. The Board has not jurisdiction, and even if they had this is not a case in which it should be exercised. This is not an agreement to which sections of the Railway Act are applicable, but it was obtained by sanction of an Act of Parliament; being a Special Act it comes within the provisions of section 3 of the Railway Act, and when in conflict overrides the General Railway Act when relating to the same subject matter and section 30 of the Railway Act must be read in conjunction with that section.

January 12, 1909. THE CHIEF COMMISSIONER.:—The position of the matter is not very complicated. The two railways make an agreement and part of the agreement is that compensation, in the event of dispute, is to be adjusted by a tribunal of their own selection. That being an agreement in perpetuity, they go to Parliament and get it ratified. The statute confirming the agreement states that the agreement shall be regarded as re-enacted in each session. Now, it seems to me, that Parliament has by that Special Act stated the tribunal that shall settle the difficulty between these two companies in the event of them not being able to settle it themselves, and that the effect of the Special Act is just the same as if there had been an independent and separate section in the Act, stating that in the event of difficulties arising between the two companies regarding compensation to be paid to one by the other, such difficulty should be settled by a Board of Arbitration, one to be selected by each, and an umpire by the two. If that is the proper view of it, I should fancy it

could hardly be contended that that would not be a provision that the Railway Act could not override, because of section 3 in the Act, which distinctly states that where the provisions of the Railway Act conflict with any provisions in any Special Act, the provisions of the Special Act shall override the provisions of the General Act. So that it seems to me perfectly apparent that Parliament has provided, by reason of the agreement between these two companies, the tribunal to settle their difficulties, and that the Railway Board has no jurisdiction. It seems to me, further, even if that were not the strict legal view of it, that where two companies have entered into an agreement as to how their difficulties shall be settled, the Railway Board should ask them to abide by the agreement and settle it as they agreed to settle it. The Board is not supposed to intervene for the purpose of destroying agreements between parties. If there had been no agreement, and the parties were at large, then they could have come here, but, having provided by their agreement, how they should adjust their difficulties, it seems to me that even if the view regarding the Special Act that I have enunciated were not correct, it would not be a wise thing for the Board to assume jurisdiction in such cases. We know of many agreements on foot between railway companies regarding leased lines, and so on, where arbitrators fix the compensation. I do not think it would be proper for the Board to intervene and take away the tribunal to which the parties agreed to go, and assume jurisdiction ourselves. We are all agreed that in this case there is no jurisdiction.

JURISDICTION OF THE BOARD—SUBWAY—AGREEMENT.

MANITOBA.]

[COURT OF APPEAL.

FRASER V. CANADIAN PACIFIC R.W. CO.

(17 Man. R. 667).

BEFORE HOWELL, C.J.A., PERDUE AND PHIPPEN, JJ.A.

Injunction—Construction of subway under railway tracks along highway—Privilege to raise grade of highway “or any part thereof”—Railway Commission, jurisdiction of—Interim injunction affirmed on appeal, effect of.

For many years the defendants, by agreement with the city of Winnipeg, had occupied a portion of the width of Point Douglas Avenue in said city with the tracks of its main line. In 1904 a further agreement was made between the city and the company, and ratified by the Legislature, whereby the company obtained the right to raise the grade of Point Douglas Avenue or of any part thereof to a height not exceeding ten feet above the then existing grade upon certain conditions.

Held, that the words “or any part thereof” related to a part of the breadth as well as of the length of the avenue, and that the defendants had a right to raise the grade of the southerly forty-five feet in width of the avenue leaving twenty-one feet at its original height, although the result of that was to diminish the value of the plaintiff's lots on account of the construction of a subway alongside of them.

Held, also, that an order of the Board of Railway Commissioners granting leave to the defendants to construct such subway was valid and binding, although it had been made *ex parte* and in ignorance of the fact that the plaintiff had previously obtained an interim injunction against such construction, the plaintiff having made no application to rescind or vary the order as he might have done.

C. P. R. v. G. T. R. (1906), 12 O.L.R. 320, followed.

The interim injunction granted in 1905 had been affirmed on appeal before the hearing of the cause.

Held, that that decision was not binding on the trial Judge and did not divest him of the responsibility of deciding the case upon the merits at the hearing.

APPEAL from decision of Cameron, J., dismissing the action with costs.

A. M. Fraser, the plaintiff, was the owner of two lots on the northeast corner of Rachel Street on Point Douglas Avenue. The C. P. R. built a spur track across part of Point Douglas Avenue, which prevented Fraser's approach to the lands from the west. In addition, the earth taken out from the Rachel

Street subway was put on his lots without his leave. He brought this action for an injunction to restrain the C. P. R. from doing any further damage to his property, and an injunction was granted by Richards, J.A., until the hearing.

March 6, 1908. CAMERON, J.:—By-law No. 2,790 of the city of Winnipeg, validated and confirmed by the Legislature of Manitoba, 3-4 Edw. VII. c. 64, authorized the Canadian Pacific Railway Company under the agreement set forth therein to re-arrange its tracks upon Point Douglas Avenue, to re-construct the same and construct additional tracks, and for that purpose, should the company think proper, to raise the grade and surface of the avenue, or of any part thereof, and tracks thereon to a height not exceeding ten feet above the then existing grade. The width of the avenue is sixty-six feet, and it had already been partly occupied by the company under by-law No. 143, of the 3rd March, 1881. Purporting to proceed under the above agreement and plans thereunder, the railway company raised the grade of the southerly forty-five feet of the avenue 6.7 feet above the level of the northerly twenty-one feet, and constructed a subway under the forty-five feet with approaches from Rachel Street on the north and Annabel on the south; such subway and approaches conforming with the plans. The plaintiff owns a parcel of land, comprising two lots, situate at the corner of Rachel Street and Point Douglas Avenue, with 132 feet frontage on each, and brought this action on the 4th November, 1905, to restrain the defendants from proceeding with the work and asking other relief.

It is alleged on behalf of the plaintiff that his property, by reason of the raising of the grade and of the construction of the subway and of the excavation of the approaches from Rachel Street, has been injuriously affected, and that, under the true construction of the above agreement, the company is bound to raise the grade of the northerly twenty-one feet uniformly with that of the southerly forty-five and to construct the subway under the whole width of the avenue. A mandatory injunction

compelling the defendant company to do this is asked for at the trial of the action, upon obtaining which the plaintiff proposes to recover compensation. The questions at issue are thus reduced within a narrow compass.

I have given the wording of the agreement in question (which is not entirely free from ambiguity) my best consideration, having in view the whole work contemplated thereby, its character and the attendant circumstances. Under section 1 of the agreement the company is given the privilege of raising the grade on Point Douglas Avenue "or of any part thereof" to the height limited thereby. Section 15 of the agreement prescribes that the company shall, when the grade on Point Douglas Avenue is raised, construct a subway, in lieu of the crossing therein mentioned, "from Annabel to Rachel Streets" across the avenue, the character and plans of which shall be approved by the council. Rachel Street runs northerly and Annabel Street southerly from the avenue. The avenue antedates both these streets. It is contended that the subway, to be constructed "in lieu of the crossing," must run wholly underneath the avenue for its whole width of sixty-six feet, and that the grade on the northerly twenty-one feet must be raised to a level with that of the southerly forty-five. It therefore becomes necessary to examine the words "or any part thereof" in the fifth and sixth lines of section 1 of the agreement.

Obviously these words mean what they say and must be held to include the dimensions of breadth unless they appear to be otherwise controlled or limited. I am unable to find in this agreement, in sections 1, 3, 15 or elsewhere, any unequivocal expression of intention to give these words other than their natural signification.

On the contrary I find in section 1 an intention declared that the northerly twenty-one can be considered and dealt with separately from the southerly forty-five feet of the avenue; and, read in connection with this declared intention, the words "or any part thereof" must be taken to refer to width. This

intention to separate the southerly forty-five feet from the northerly twenty-one re-appears in section 3 and it is to be noted that the subway provided for by section 15 is to be in substitution for the crossing mentioned in the third section.

The length of the subway is nowhere precisely specified in the agreement. That with other details is left undetermined except so far as covered by the words found in the fifteenth section, that "the character and plans" of the subway "shall be submitted to and approved by the council." It is entirely reasonable to conclude that this provision was made because it was in the contemplation of the parties that the southerly forty-five feet should be raised before the northerly twenty-one.

The word "subway" is not in my opinion a strictly technical term, and it can readily and reasonably be held to include not only the passage underneath the superstructure but the approaches thereto. The words "from Annabel to Rachel Streets" are not to be read in their narrow topographical meaning, but in a popular sense and as words of description merely. Considering that the term "subway" can be taken to include the approaches, I find no difficulty on this point.

I therefore hold that the subway has been constructed and is intended by the defendants to be constructed in accordance with the agreement in question and with the plans made pursuant thereto.

It was argued with considerable force that the effect of this construction would be to leave the avenue intersected by the excavation at Rachel Street and therefore rendered useless and no longer in "good passable condition." In some measure this is no doubt the result. But it cannot be contended that the avenue will thus be wholly destroyed as a thoroughfare. It is still capable of being extensively used, and the extent to which traffic upon it is hampered by the excavation north of the forty-five feet seems to me a necessary incident of the agreement between the city and the railway company which was presumably within the contemplation of the parties. In large and expensive works of this character, involving many and conflicting

interests, anomalous conditions are almost certain to arise. If these result in damages to individuals then compensation therefor must be sought in the manner prescribed by law. In my judgment the provisions of section 1 of the agreement are subject to those of section 15, the subway need not necessarily be carried under the whole sixty-six feet of the avenue, and, in this respect, the plans and the work done in accordance therewith do not conflict with the agreement.

After the interim injunction order herein was granted on the 4th December, 1905, an order was made by the Board of Railway Commissioners on the 20th December, 1905, that the railway company be granted leave to construct a subway in lieu of a level crossing "where its railway tracks cross Rachel Street" as shewn on plans filed and that the plans be approved. This order of the Board is pleaded in bar by the defendants, and the plaintiff alleges that it was obtained suppressing the fact that this action had been brought and the injunction order obtained. It appears that no application has been made to the Board to rescind or vary its order. There can be no question of its jurisdiction to make the order, and it still stands in full force. It is strongly urged that I should under the circumstances look at the order as permissive merely and disregard it or set it aside. I feel, however, that I cannot accede to this argument. If any authority were needed, the decision of Mr. Justice Clute in *C. P. R. v. G. T. R.*, 12 O.L.R. 320, is in point. The Board may make an order without notice, but any person entitled to notice may apply to vary, amend or rescind it. It seems to me beyond question that the plaintiff is effectually concluded by the order of the Board.

It occurred to me that, as the ownership of the avenue is vested in the Crown, it should be made a party, especially as other interests than those of the plaintiff might be affected by the issue of a mandatory injunction. But it is not necessary to discuss this or the question of the status of the plaintiff or of the propriety of the form of proceedings taken, as I hold that the plans and the work done and intended to be done under the

plans filed with the Board of Railway Commissioners are not in violation of, but in accordance with, the agreement ratified and re-enacted by the Legislature and approved by the order of the Board of Railway Commissioners.

I cannot yield to the argument that I am practically bound by the judgment granting the interim injunction affirmed on appeal. That order does not, and was not intended to, divest me of the responsibility of deciding this case upon the merits as presented at this hearing. In the public interest, and on the grounds stated, I hold that the order should be dissolved.

The action will, therefore, be dismissed with costs including the costs of the motion for injunction.

Plaintiff appealed.

W. Redford Mulock, K.C., and C. P. Wilson, for the plaintiff, appellant. This case involves the construction of the agreement between the city and the C. P. R. set out in pages 188 to 195 of the Statutes of 1904. The Act validates the by-law and the agreement. The question is, if the work was done differently from that directed, was there power to do it? The agreement contemplates leaving open the northerly twenty-one feet of Point Douglas Avenue for all time. If this twenty-one feet is cut off or cut through to let the subway through, it would leave a gap of 49 feet, 6 feet deep. Compensation to parties injured is provided for in the agreement. If the work done was outside the agreement plaintiff has a right to go to the Court for an injunction. It was contemplated that the twenty-one feet should at all times be kept open so that plaintiff and other parties could get out to Main Street. Plaintiff requires the subway put in so that the northerly twenty-one feet may be travelled over. Plaintiff's action was brought on the assumption that the C. P. R. was doing the work for the city as agents. After the injunction was granted by Richards, J.A., an application was made to the Railway Commissioners by the C. P. R. *ex parte* on consent of the city and an order obtained by prov-

ing the plans. This was put in as a conditional defence. The Commissioners cannot close the street, or interfere with its use: *Parkdale v. West*, 12 A.C. 602. The order of the Railway Commissioners is no defence to this action. They can only act in accordance with the provisions of the Railway Act. The C. P. R. cannot proceed with the work under that order until they file plans and take proceedings to compensate the parties. No steps have been taken here to ascertain the amount of compensation. Mr. Whyte said the C. P. R. were not doing the work under the order of the Railway Commissioners. The C. P. R. had no right to apply for an *ex parte* order. When they acted under the order the plaintiff might apply to the Railway Commissioners to rescind same, but the railway is not acting under the order, but under the agreement alone. The plaintiff's statement of claim was filed on the 4th November, 1905, the application to the Railway Commissioners is dated 1st December, 1905, the order granting the injunction is dated 14th December, 1905, the order of the Railway Commissioners is dated 20th December, 1905. As to obtaining an order of the Railway Commissioners: *Hendrie v. Toronto Hamilton Ry.*, 27 O.R. 46; *Bannatyne v. Suburban Rapid Transit Co.*, 15 M.R. 7; *Smith v. Public Parks Board*, 15 M.R. 249.

Isaac Campbell, K.C., and *T. A. Hunt*, for the city of Winnipeg. It would not be feasible to use the twenty-one feet on Point Douglas Avenue as an ordinary street. There was an amendment to the Winnipeg Charter in 1903, ch. 45, sec. 30. The whole agreement should be looked at and all the provisions taken into account. Section 15 deals with the subway by itself and section 1, as to keeping Point Douglas Avenue open, does not control section 15. As to the second part of paragraph 1, if the C. P. R. should raise the grade clear across the street, then the construction of the last part of paragraph 1 should have been a covenant, not a condition. The latter form shews they had a choice. In clause 18 of the agreement and clause 7 of the by-law damages are provided for. The city is a public body

consenting to the plans proposed: *Att.-Gen. v. Great Eastern R.W. Co.*, L.R. 6 Ch. 576; *Lewis v. Weston-super-Mare*, 40 Ch. D. 62. For the Main Street subway details are specified. None in this case. All was left to the decision of the city council. The proceedings should have been taken in the name of the Attorney-General. Plaintiff only suffers more than others in degree: *Att.-Gen. v. Mayo*, [1902] 1 Ir. 13; *Att.-Gen. v. Escher*, [1901] 2 Ch. 650.

H. S. Robson, and *A. S. Bond*, for the C. P. R. The legislation passed is to be construed liberally. The environment is to be considered when construing the agreement: *Galloway v. London*, L.R. 1 H.L. 34; *Goldberg v. Liverpool*, 82 L.T. 362; *Chaplin v. Westminster*, [1901] 2 Ch. 329; *Dowling v. Pontypool*, 43 L.J. Ch. 770. The plaintiff at the hearing expressly claimed a mandatory injunction. An injunction should not be granted where the statute does not clearly support plaintiff's contention: *Att.-Gen. v. Liverpool*, 1 Myl. & Cr. 171; *Isenberg v. East India House Estate Co.*, 33 L.J. Ch. 392; King's Bench Act, sec. 39, sub-secs. (o) and (p). An injunction should not be granted in a case of this nature: *Wood v. Charing Cross Ry.*, 33 Beav. 290; *Ryde v. Isle of Wight*, 30 Beav. 616; *Parkdale v. West*, 12 A.C. 615. Plaintiff has not such special rights as to entitle him to an injunction: *Russell v. Men of Devon*, 2 T.R. 667; *Garrett on Nuisances*, 20; *Noble v. Turtle Mountain*, 15 M.R. 516; *King v. McArthur*, 34 S.C.R. 570; *Winterbotham v. Lord Derby*, L.R. 2 Ex. 316; *Chaplin v. Westminster*, [1901] 2 Ch. 329; *Met. Bd. of W. v. McCarthy*, 43 L.J.C.P. 385; *Iveson v. Moor*, 1 Ld. Ray. 486; *Caledonian R.W. Co. v. Walker's Trustees*, 7 A.C. 259; *Becket v. Midland Ry.*, 37 L.J.C.P. 11; *Caledonian R.W. Co. v. Ogilvy*, 2 Macq. H.L. 229; *Caledonian R.W. Co. v. Colt*, 7 Jur. (N.S.) 475. If the Court holds that the C. P. R. are exceeding the provisions of the Act then they should be permitted to go on under the order of the Railway Commissioners and no injunction should be granted.

The judgment of the Court was delivered by

May 6, 1908. PHIPPEN, J.A. :—The city of Winnipeg and the Canadian Pacific Railway Co., after protracted negotiations, executed an agreement dated December 3rd, 1903, for the re-arrangement of the company's tracks in the city. The contract was approved by by-law No. 2,790 and the agreement and by-law were ratified and confirmed by Act of the Legislature of Manitoba, 3 & 4 Edw. VII. (1904), ch. 64. Both will be found printed as a schedule to the confirming Act.

The works undertaken by the company were of considerable magnitude and the agreement bears evidence it was contemplated they would occupy some time in their completion.

At the time the agreement was made the company's line entered Winnipeg from the east upon Point Douglas Avenue, a street 66 feet wide, running east and west. The company's tracks were at that time laid along a portion of the street under the authority of city by-law No. 1,881, printed at page 367 of the consolidated by-laws of the city. For a number of years past, while open to street traffic, the avenue had been used principally for railway and shipping purposes. A number of warehouses had been erected along its north side, east of Main Street, and the company, in addition to two through traffic tracks, had laid industrial tracks upon the street for shipping accommodation. No portion of the avenue was actually closed by by-law 1,881. While the company was authorized to place tracks upon the street, the whole avenue remained open for public traffic, but in fact its utility as a street was very largely curtailed by the operations of the railway.

By the agreement of 1903 the avenue west of Main Street was entirely closed and handed over to the company; east of Main Street to a specified point, distant therefrom probably three-quarters of a mile, and past the *locus in quo*, the southerly 45 feet of the avenue, except a crossing at Rachel Street, was also closed and handed over to the company, and the company was authorized to lay tracks on the northerly 21 feet of the

avenue but so as not to obstruct this portion of the street. *Ex abundante cautela* the cross streets, in so far as they were identical with any of the closed portions of the avenue, were also closed.

The re-arrangement contemplated the raising of the company's tracks. It authorized the company to raise the grade of the avenue as it might deem advisable but so as "not to exceed ten feet above the present grade of its main track on the said Point Douglas Avenue." The company undertook to at once proceed with the construction of a subway at Main Street and, until its tracks were raised, to maintain a level crossing with gates and watchmen at Rachel Street. When the tracks were raised the company agreed to supplant this level crossing with a subway.

The sections of the contract which were most referred to in the argument are as follows: "1. That the city gives and grants the right and privilege to the company to, in any manner and at any time the company thinks proper, re-arrange the location of its tracks upon Point Douglas Avenue, in the city of Winnipeg, and re-construct the same and construct any additional track or tracks of railway along, upon or over any part of the said Point Douglas Avenue west of the westerly limit of McArthur Street produced northerly, and use and operate the same, and for that purpose, should the company think proper, to at any time raise the grade and surface of Point Douglas Avenue, or of any part thereof, and tracks thereon to such height and at such points as the company may deem advisable, but not to exceed ten feet above the present grade of its main track on the said Point Douglas Avenue. Provided, however, as to the northerly twenty-one feet in width of said avenue east of Main Street and west of the line between lots fifteen (15) and sixteen (16) referred to in paragraph 3, so long as and to the extent that it remains an unclosed street, the right of the company to lay tracks and raise the grade shall be subject to the condition that there shall be no obstruction thereof, unless by consent of the city, without turning the street so as to leave an open

and good passage for carriages, and on completion of the works placing the street in good passable condition, and the rail itself, if it does not, when the works are completed, rise above or sink below the surface of the road more than one inch, shall not be deemed an obstruction, and subject also to the condition that the company shall properly grade up the approaches into said twenty-one feet of the streets running thereto from the north, which the company hereby agrees to do."

"15. That the company will make and maintain a level crossing from Annabel to Rachel Street across the company's tracks on Point Douglas Avenue, and will provide gates and a watchman therefor. Provided, however, that when the company desires to exercise its right to raise its tracks or the grade of the said Point Douglas Avenue as hereinbefore mentioned, at such point, the company will then construct for and on behalf and under the authority of the city, a subway crossing in lieu of such level crossing, the company doing the work and procuring the materials therefor at its own expense. Such subway shall be forty-nine feet in width and the character and plans thereof shall be submitted to and approved by the council. Said subway from Annabel to Rachel Streets shall be constructed and completed within four years and six months after the said ratification and confirmation aforesaid. If the council and company cannot agree as to the character and plans, the question in difference shall be submitted to the Railway Committee of the Privy Council of Canada."

Thereafter the plaintiff purchased two vacant lots at the north-east corner of Rachel Street and the avenue. Rachel Street leads into the avenue from the north, about half a mile east of Main Street, and immediately to the west of the plaintiff's property. It is 66 feet in width. Nearly opposite to Rachel Street, and practically as a continuation thereof, Annabel Street, forty-nine feet in width, leads out of the avenue to the south. At the time of the agreement streets in the locality of the plaintiff's property were so arranged that traffic from the plaintiff's land must find its way to the business portion of

the city across the tracks and along Annabel Street, or some parallel street, or westerly for a distance at least along the avenue, otherwise (assuming Rachel Street to be stopped as at present) easterly along the avenue and then by a circuitous and most inconvenient route to the north and west to Main Street. As a matter of fact, the evidence shews that practically all traffic from the north side of the avenue found its way across the avenue at the nearest cross street and so to its destination along ways to the south of the tracks.

At the date of the agreement there were three tracks on the avenue at the point between Rachel and Annabel Streets—two through tracks and a side track for local warehousing accommodation.

Since the agreement the company has raised practically the whole southerly forty-five feet of the avenue about six and one-half feet, entirely cutting this portion off for traffic either along or across the street. It has, to some extent, re-arranged its tracks on the northerly twenty-one feet of the avenue, which portion of the street remains at its old level. It has removed the local track from the avenue between Rachel and Annabel Streets, connecting the industrial track so severed with its main tracks at two points by steep grades, both east and west of Rachel Street.

To carry out its agreement with the city the company prepared plans of a subway at Rachel Street, which plans were submitted to and approved by the city as provided by clause 15 of the contract, and work has progressed to the extent of excavating the subway, which, at present, is partially completed so as to permit of temporary use.

The subway, if completed according to the agreed plans, will be of the width specified in the contract, with a headroom of fourteen feet. The excavation will necessarily render Rachel Street useless as an approaching street to the avenue. To minimize the length of the grade approaches, or for other reasons appealing to the judgment of the contracting parties, the least depth possible, providing the necessary headroom, has been

adopted. As the tracks are some six feet higher than the northerly 21 feet of the avenue, it is impracticable, without raising the avenue grade to the track level or increasing the depth of the subway, to cover all that portion of the subway crossing the northerly twenty-one feet of the avenue. The result is that the avenue is, and will continue, completely severed for all traffic purposes east and west at Rachel Street, rendering it entirely useless to the plaintiff's property as a street to the west and forcing his traffic, on the arrangement of the streets as they were when the agreement was made, along the avenue to the east and by the inconvenient and lengthened route above described to Main Street. Of this the plaintiff complains and seeks a mandatory injunction to compel the contracting parties to construct the subway according to what he argues are the terms of the agreement and ratifying Act, leaving the avenue open to him as a street to the west.

The permanent severing of the avenue is undoubtedly an appreciable damage to the plaintiff's property. It is not contended the city has authority (without at least taking steps under its charter, which it has not attempted to take, and which might or might not authorize what has been done), apart from the power conferred by the ratification of the contract, to permanently sever the avenue, and it therefore becomes necessary to determine how far the contemplated work has been authorized by the special legislation.

By section 23 of the ratifying Act "By-law No. 2790 of the city of Winnipeg, set out in schedule B. hereto, is hereby validated and confirmed in all respects as fully as if the provisions of the said by-law and the said agreement made a part thereof had been enacted by the legislature of this Province." The agreement having thus received the force of an Act of the Legislature, all powers therein assumed, or necessarily to be inferred from its provisions, are effective and binding upon private interests, private rights being fully protected by the very ample provision for compensation for damages occasioned by the works.

The first argument advanced on behalf of the appellant was that the right of the railway to raise the grade or any part of the grade on the avenue was restricted to a raising of the whole grade for the full width of the street at the point or points selected by the company. That is, that, while the company could raise a particular portion of the grade longitudinally within the limits imposed, it could not raise the southerly forty-five feet leaving the northerly 21 feet, alongside the raised portion, at the old or some other level. While this argument, which was based on a consideration of the by-law of 1881, of the use of the word "grade" in the contract, of the covenant to construct approaches and of certain minutiae in the agreement, was strongly urged, it did not appeal to my mind as tenable. When it was pointed out to the appellant's counsel that, carried to its logical result, such a construction would necessarily lead to the blocking of all present warehouses by their being put out of loading track level, would block the entrance to a valuable hotel and would leave a six foot perpendicular approach from Main Street to the northerly twenty-one feet of the avenue, the contention was changed to one that the company was limited to a full raising at Rachel Street with an incline of the grade on the northerly 21 feet of the avenue until it reached its present level at Main Street.

I must confess I can find nothing to justify this construction of the agreement. On the contrary the agreement expressly states that the company may, for the purpose of the works or operations authorized by the earlier part of section 1, should it think proper, at any time, raise the grade and surface of Point Douglas Avenue or of any part thereof and tracks thereon to such height and at such point as it may deem advisable, but not to exceed, etc. I think the agreement means exactly what it states in what, to my mind, is plain and unequivocal language, and that we would be straining for a false construction to hold that "any part of the grade at any point" means the whole grade and nothing less than the whole grade at that point.

Again, section 15 provides "that when the company desires

to exercise its right to raise its tracks or the grade on Point Douglas Avenue" at Rachel Street it will construct the subway. It would be difficult to raise the company's tracks without raising that portion of the grade beneath them. When the agreement speaks of raising the tracks *or* the grade it uses the word "grade" as distinguished from, not as synonymous with, "tracks," and either as embracing the whole grade, including the portion on which the tracks are laid as well as the northerly twenty-one feet, or as referring to the northerly twenty-one feet alone, thus recognizing the right of the company, at the identical point in issue, to raise either the tracks *or* the whole grade, a right inconsistent with the contention of the plaintiff.

It was next argued that the agreement expresses a clear intention that the northerly twenty-one feet of the avenue should remain open as a street, to this extent limiting the power of the contracting parties to agree as to the plans and character of the subway. In other words, that the power to construct the subway is subservient to the obligation to keep the avenue open, thus restricting the contract as empowering its severance.

While the southerly forty-five feet is stopped up the northerly twenty-one feet is expressly accepted from closure and, although the company is authorized to lay tracks and raise the grade, it can only do so subject to the following express limitation: "Provided, however, as to the northerly twenty-one feet in width of said avenue . . . so long as and to the extent that it remains as an unclosed street, the right of the company to lay tracks and to raise the grade shall be subject to the condition that there shall be no obstruction thereof unless by consent of the city without turning the street so as to leave an open and good passage for carriages and, on completion of the works, placing the street in good passable condition, and the rail itself, if it does not, when the works are completed, rise above or fall below the surface of the road more than an inch, shall not be deemed an obstruction, and subject also to the condition that the company shall properly grade up the approaches into the

said 21 feet of the streets running thereto from the north, which the company hereby agrees to do."

It will be observed that the company is authorized to proceed immediately with certain of the works; others, which are to be undertaken, are to be delayed in their natality until the plans are approved by the city. While the company is authorized to lay tracks on the northerly portion of the avenue, it is forbidden to unnecessarily interfere with its use as a street, either in the location or construction of tracks or in the contemplated grade changes.

I cannot bring myself to believe, however, that this restriction against closing the street extends beyond the provisions of section 1 of the contract. The language is plain, that the company, in proceeding with stated works, is not to close the northerly twenty-one feet as a street, but I fail to conclude from this an intention to necessarily keep this portion of the street open as against other authorized works, works the plans and character of which must be approved by the city before they can be undertaken and the details of which could not have been anticipated by the contracting parties when the agreement was made.

The appeal was argued as if sections 1 and 3 should be construed as sections of an Act of the Legislature. That to my mind is scarcely correct. The language was first used in a contract and the intention of the contracting parties was not altered by the agreement subsequently receiving legislative sanction. The meaning must therefore be sought as in a contract, which contract was to depend on legislative approval for its validity and one, therefore, the terms of which could not be altered by subsequent agreement between the contracting parties. Under such circumstances I would not anticipate unnecessary restrictions on the manner of executing contemplated works, the particulars of which were then unknown but which afterwards required the approval of all agreeing parties before being proceeded with. Legislative authority has been granted to carry out the intended works. One of these works is the subway

which is to be constructed under the authority of the city after the character and plans have been submitted to and approved by the council unless restricted by other portions of the contract, the agreement, when ratified, is a statutory authority to construct in any suitable manner, of which, I think, the council, as the natural guardian of the city's streets, is the safe and proper judge. Having regard to the local conditions as disclosed by the evidence, I cannot conclude that the construction of the subway as proposed is unreasonable.

This is not the case of severing an important highway. The avenue has been a street in name only since Winnipeg became known. Carrying the traffic of a great transcontinental railway, with its surface covered with main and industrial tracks, blocked with cars loading at warehouses and rendered dangerous by passing trains, it must have been, as pictured by witnesses, a street to be avoided rather than travelled. Under the terms of the agreement two-thirds of the street were to be entirely stopped, and the company is given unlimited rights to lay industrial tracks on the remaining twenty-one feet, a strip so narrow as to be blocked by a loading car. While by section 1 the company is forbidden from entirely closing it by its tracks or grade changes, the authorized works have so minimized its street usefulness as to avoid any violent presumption against the authority of the city to determine that other authorized improvements may best be proceeded with at the penalty of its severance, particularly when all damages including those occasioned by severance are made the subject of compensation and charged against the railway.

I am unable to find in the terms of the contract any limitation on the right of the city to sever the street impliedly granted by section 15 should such action appear seasonable and proper in executing the authorized work. Considering the magnitude of the contemplated undertaking and realizing the impossibility of complete anticipation at the time of the agreement, the contract should be broadly construed along those lines which em-

power the city to work it to a harmonious and successful conclusion.

Much that I have said applies to the next point taken by the appellant, that the subway was to be in lieu of a level crossing and was, therefore, to be a subway to the extent that the crossing was a crossing; that it was to be a subway from Rachel to Annabel Streets, whereas the subway being constructed is not a subway from street to street, a part of the distance being occupied by the necessary approaches. I cannot impose any such technical limitation on the city in approving, as authorized, the plans of the work. The language of the agreement is at most descriptive. It would be narrow indeed to hold that the agreeing parties intended to thus limit the exercise of their later judgment.

I do not concern myself with the Railway Act. Having held the work is authorized by the local Act, and the Railway Committee having by order sanctioned its execution, and counsel for the plaintiff admitting his claim is for an injunction alone, and it appearing that the work is not being done under the Railway Act, such a consideration would be foreign to the issue.

In view of the able and exhaustive judgment of the learned trial Judge, which I fully adopt, I have possibly discussed the issues at unnecessary length. The fact that counsel have shewn by their very full arguments the importance they attach to the question must serve as my justification.

The appeal is dismissed with costs.

Appeal dismissed.

October 16, 1908.—No one appearing for the appellants in the Supreme Court the appeal was dismissed.

EXPROPRIATION.

MANITOBA.]

[MACDONALD, J.]

BENNETTO V. CANADIAN PACIFIC R.W. Co.

(18 Man. R. 13).

Railway company—Expropriation of land—Acceptance of amount offered by company—Railway Act, 1903, sec. 159.

Under section 159 of the Railway Act, 1903, if the owner of land sought to be expropriated by the railway company does not accept the offer of the railway company within ten days, the company may at once proceed to have the amount of the compensation payable determined by arbitration; but the owner may accept the offer at any time after the expiration of ten days if in the meantime the company has taken no further proceedings, and such offer and acceptance will constitute a binding contract between the parties upon which the owner may proceed in an action to recover the amount offered.

Action taken to recover payment of \$6,700 for land taken by defendant company.

April 25, 1908. *J. E. O'Connor* and *H. P. Blackwood*, for plaintiff, cited *Railway Act, 1903*, ch. 58, secs. 154, 155, 156, to 174; *Adams v. London*, 2 M. & G. 132; *Regent's Canal Co. v. Ware*, 23 Beav. 375; *Re Cary-Elwes' Contract* (1906), 2 Ch. 143; *Bristol Co. v. Somerset R.W. Co.*, 22 W.R. 399; *Tawney v. Lynn*, 16 L.J. Ch. 282; *Canadian Pacific R.W. Co. v. Little Seminary of Ste. Thérèse*, 16 S.C.R. 606; *Haskill v. Grand Trunk R.W. Co.*, 7 O.L.R. 429; *Mason v. Stokes Bay Co.*, 32 L.J. Ch. 110; *Hill v. Clifford*, 76 L.J. Ch. 627; *Re Hazeldine's Trusts* (1908), 1 Ch. 34; *Wilde v. Russell*, L.R. 1 C.P. 722; *Davy v. Haddon*, 3 Doug. 310; *Re May*, 28 Ch. D. 518; and *Read v. Victoria Station Co.*, 1 H. & C. 826.

W. H. Curle, for defendants, cited *Dart on Vendors and Purchasers*, 1001; *Sugden's Vendors and Purchasers* (14 ed.), 364; *Canadian Pacific R.W. Co. v. Little Seminary of Ste. Thérèse*, *supra*; *Toronto R.W. Co. v. Hendrie*, 17 P.R. 199; *Re Canadian Pacific R.W. Co. and Batter*, 13 Man. L.R. 200; and *Gould v. Stafford Shire Water Works Co.*, 5 Ex. 214.

May 4, 1908. MACDONALD, J.:—On the 11th of August, 1904, the Board of Railway Commissioners for Canada, under and by virtue of the Railway Act of 1903, ordered that the defendant company be authorized to construct a track or tracks and to take and appropriate for that purpose certain properties, of which the property in question in this action is a part.

On the 22nd of October, 1904, the defendant company in pursuance of the Railway Act deposited in the Land Titles Office, district of Winnipeg, the plan, profile, and books of reference together with the Orders of the said Board of Railway Commissioners.

On or about the 10th of November, 1904, the defendant company, in pursuance of sections 152 and 154 of the Railway Act, served a notice upon the plaintiff describing the land to be taken, declaring their willingness to pay to the plaintiff the sum of \$6,700 as compensation for same and the taking thereof. This notice also advised the plaintiff, that, if this offer be not accepted, the company appointed as arbitrator Robert Thomas Riley, Esquire, of the city of Winnipeg. The plaintiff on or about the 30th of June, 1905, accepted the offer made by the defendant company. No proceeding had in the meantime been taken by the company, but after acceptance by the plaintiff the defendant company made application to the Honourable Mr. Justice Richards, Judge of the Court of King's Bench, and acting as such and exercising jurisdiction under and by virtue of section 159 of the Act, for an order to appoint an arbitrator, or arbitrators, for the purpose of determining the compensation to be paid to the plaintiff, when it was decided by the Honourable Mr. Justice Richards that the said acceptance on the 30th day of June, 1905, of the offer made by the defendant company was a compliance with section 159 of the Act, and thereby dispensed with the necessity of the appointment of an arbitrator or arbitrators as required by the said section.

The plaintiff brings this action to recover payment of the \$6,700 so offered by the defendant company and accepted by him, and the defendant company resists payment on the ground that,

within ten days after the service of the notice of the 10th of November, 1904, the plaintiff did not, nor did the Keewatin Lumbering & Manufacturing Company, Limited, who were mortgagees of the land in question, give notice that he, or they, accepted the said sum offered as provided by the said Act, and thereupon the defendant concluded that the plaintiff did not intend to accept the said offer, but had refused the same, and that the defendant made application, under section 170 and other sections of the said Act, for a warrant placing the defendant company in immediate possession of the said lands and that arbitration proceedings had thereby been commenced and that, if the plaintiff has any right or title to compensation by reason of the taking and expropriation of the said lands by the defendant company, the same can be determined only by arbitration as provided by the said Act and not otherwise, and that this Court has no jurisdiction to determine or award the same.

It is urged on behalf of the plaintiff that the decision of the Honourable Mr. Justice Richards, in refusing to appoint an arbitrator because of the acceptance by the plaintiff of the offer of the defendant company of \$6,700 compensation referred to, places the matter *res judicata*.

The learned Judge was not acting in his capacity as a Judge of this Court, but under the authority of the Railway Act as a *persona designata*. He was not empowered, or called upon, to decide any question of law or fact; his reasons, in my opinion, for declining to name an arbitrator cannot be accepted as conclusive, particularly in view of the fact that there is no appeal from his decision.

It is claimed on behalf of the defendant company that, under section 159 of the Railway Act the plaintiff must accept the compensation offered within ten days from the service of the notice and, if he does not, the only remedy he then has is by arbitration as provided by the Act. I do not so interpret that section. The company may, after the expiration of the ten days, proceed by way of arbitration, but until it does so the owner is entitled to accept the offer made and the plaintiff herein did accept defen-

dant company's offer, the price was fixed and the contract between them is complete and the relation of vendor and purchaser is as fully constituted as in the case of a regular formal agreement.

There will be a verdict for the plaintiff for \$6,700, together with interest from the 30th day of June, 1905, and the costs of this action.

EXPROPRIATION—AWARD—APPEAL.

MANITOBA.]

[COURT OF APPEAL

CANADIAN NORTHERN RAILWAY V. ROBINSON.

(17 *Man. R.* 396).

BEFORE RICHARDS, PERDUE AND PHIPPEN, J.J.A.

Railway company—Compulsory taking of land—Railway Act, R.S.C. 1906, ch. 37, secs. 192-214—Appeal from award of arbitrators—Interest on amount awarded.

1. Upon an appeal, under sec. 209 of the Railway Act, R.S.C. 1906, ch. 37, from an award of arbitrators determining the compensation to be paid to an owner for the compulsory taking of his lands by a railway company, the Court will not assume the function of the arbitrators and make an independent award, but will rather treat the matter as it would an appeal from the decision or verdict of a Judge, and the award will not be disturbed, unless the arbitrators manifestly erred in some principle in arriving at their conclusion.
2. Interest on the amount awarded should not be added by the arbitrators, especially in a case where the claimant remains in possession of the property until after the date of the award.
3. It is proper that the claimant should be allowed the actual value of the property to him, and not merely the market value as on a sale.
4. The arbitrators are not bound to allow ten per cent. extra on the amount of the compensation for the compulsory taking, although that is frequently done, and the Court will not interfere with their refusal to allow such percentage.

Two appeals, heard together, from an award rendered by arbitrators.

The claimant, Mr. Robinson, had a wood and lumber yard adjoining or near the company's railway yard at Winnipeg. His property consisted first, of several lots and portions of lots

which, with a lane (included in the property), formed a triangle with a frontage on Wesley Street of 266 3-4 feet. The total area of the triangle was slightly greater than would be the area of an oblong block of lots of 266 3-4 feet frontage both on Wesley Street and on the lane in rear. There were also two lots, numbered 35 and 38, not adjoining each other or the triangle (each of them being across Wesley Street from a portion of the frontage of the triangle), but used as part of the same yard property with the triangle. There was a spur track from the company's lines to the southerly side of the triangle, and lot 38 was immediately opposite that portion of the triangle upon which this spur stood. The claimant had tried to get a spur track put in across the street to lot 38, but had not succeeded in doing so, although he had obtained a resolution of the city council consenting to his doing so.

The company took proceedings to acquire the land by expropriation under the provisions of the Railway Act. The claimant obtained from the Board of Railway Commissioners an order allowing him to retain possession until 1st of May, 1907. On 11th July, 1907, two of the arbitrators, Messrs. Macdonald and Galt, made the award, the third arbitrator, Mr. Christie, having declined to sign it.

The arbitrators allowed the following sums to the claimant: \$97,440 for the land; \$5,350 for the improvements, and \$10,000, to cover additional cost to which they estimated the claimant would be put to during two years after leaving the property, in the haulage in connection with his business. They also allowed him the sum of \$939.88, being interest at 5 per cent. from 1st May, 1907, (the date to which the Railway Commissioners had permitted the claimant to stay) to 1st of July, 1907, making a total of \$113,729.88.

Both parties appealed from the award to this Court.

I. Pitblado, and *A. B. Hudson*, for Robinson, cited Railway Act, R.S.C. 1906, ch. 37, sec. 178, sub-sec. 7, secs. 178, 192, 196, 209; *Morley v. Klondike Mines R.W. Co.*, 6 Can. Ry. Cas. 183,

191; *Atlantic & North-West Co. v. Wood*, [1895] A.C. 257; *In re Cavanagh and Canada Atlantic R.W. Co.*, 6 Can. Ry. Cas. 395, 14 O.L.R. 523; *MacPherson v. Toronto*, 26 O.R. 558; *MacMurchy & Denison*, Canadian Railway Law, p. 184; *Stebbing v. Metropolitan Board of Works*, L.R. 6 Q.B. 37; Hudson on Compensation, pp. 288, 291; Mayer on Compensation, p. 154; *Ricket v. Metropolitan Ry. Co.*, L.R. 2 H.L. 205; *Bailey v. Isle of Thanet Light Rys. Co.*, [1900] 1 Q.B. 722; *Re Tynemouth*, 89 L.T. 557; *Re Gough and Aspatia Water Board*, 73 L.J. K.B. 228; *Commrs. of Inland Revenue v. Glasgow & S. W. Ry. Co.*, 12 A.C. 315; *King v. Rogers*, 6 Can. Ry. Cas. 409, 43 Can. L.J. 623; *White v. Commissioners of Works*, 22 L.T. N.S. 591; *Ex parte Cooper*, *In re North London Ry. Co.*, 34 L.J. Ch. 373; *Bidder v. North Staffordshire Ry. Co.*, 4 Q.B.D. 432.

J. H. Munson, K.C., and *O. H. Clark*, K.C., for Canadian Northern Ry. cited *Charland v. Queen*, 1 Ex. C.R. 291, affirmed 16 S.C.R. 721; Consolidated Railway Act, 1879, ch. 9, sec. 15; *Liverpool & Milton R.W. Co. v. Town of Liverpool*, 33 S.C.R. 180. Robinson having remained in possession the award should not have included interest: *Rhys v. Dare Valley Ry. Co.*, L.R. 19 Eq. 93; *Richards v. G.W.R.*, [1905] 1 K.B. 68; *Bwlfa v. Pontypridd*, [1903] A.C. 426; *Leak v. Toronto*, 26 A.R. 351, 30 S.C.R. 321; *Harding v. Township of Cardiff*, 2 O.R. 329; *Ricket v. Met. Ry. Co.*, L.R. 2 H.L. 194; *Borthwick v. Elderslie Co.*, [1905] 2 K.B. 520; *Catling v. G. N. Ry.*, 18 W.R. 121; *Re Eccleshill Local Board*, 13 Ch.D. 365; Cripps on Compensation, 118; Mayer on Compensation, 143; *In re Cavanagh and Canada Atlantic Ry. Co.*, 6 Can. Ry. Cas. 395, 14 O.L.R. 531; *James v. Ontario & Quebec Ry.*, 12 O.R. 624, 15 A.R. 1; *MacPherson v. City of Toronto*, 26 O.R. 558; *Burnt District Case*, 4 Can. Ry. Cas. 296; Fry on Spec. Per., par. 1,399; *Nichol v. Gocher*, 12 M.R. 177, and *Sinclair v. Preston*, 13 M.R. 229.

February 29, 1908. RICHARDS, J.A.:—After hearing and considering the evidence, and before the award was made, each

arbitrator put his views of the matter in writing and submitted them to the others for consideration. A copy of the views of each of the arbitrators was put before us on this appeal. They were, by consent of both parties, to be considered as shewing how each arbitrator arrived at his opinion, in the same manner as if they were statements made on examination of the arbitrators under oath.

It is alleged by the claimant that, in arriving at the amount allowed him for the land, the arbitrators wrongfully, because of the bulk of the property being in triangular shape, took 20 per cent. off what they found to be the value of the triangle to him for his business purposes.

He also claims that they wrongfully took 20 per cent. off the value which they placed on lot 38, because, after valuing it as if the spur track extended to it, they computed that such spur track would have taken off about 20 per cent. of the area of the lot.

The company objected on a number of grounds.

They consider that the bulk of the evidence shewed the property not to be so valuable as the arbitrators found it, even after taking off the 20 per cent.

They also said that the claimant should not be allowed for lot 38, as if it had track facilities.

They further claim that the \$10,000, separately allowed with regard to extra haulage during the two years after the claimant had to leave the property, has, in fact, been taken into consideration and allowed for in arriving at the price of the land.

They further allege that the arbitrators acted on a wrong principle in allowing the interest from 1st May to 1st July.

The following is a copy of Mr. Galt's written opinion referred to above:—

“In my opinion this property, considered merely as land, is not very valuable. It is true that it is central and very near Main Street, but being isolated and hidden away I cannot regard it as desirable for business purposes.

“The shape of the triangular piece, which is about three-quarters of the whole, also greatly reduces its value.

“While this is the case there is no doubt the property is of great value to Robinson, and for his business is about as good as the land he has recently purchased at \$350 per front foot on Victoria Street. The statement that such valuable property cannot be profitably used for a fuel and lumber yard is not borne out by the evidence, and the fact that Robinson has paid this price for another yard conclusively disposes of this argument.

“It appears to me that Robinson should not be called upon to make a loss. If there is reasonable doubt, he is entitled to it, and we must see that he is left in as good a position as before the expropriation of his property. If, however, he is allowed a higher price for his land than its fair market value on the ground that it is as valuable to him as the more expensive property, he should not expect to be paid the other items of his statement in full.

“Contingent damages are extremely difficult to estimate, and there is much doubt in my mind as to what items are admissible and inadmissible. I propose therefore as a set-off against the items that are admissible, to value the triangular piece of property practically on the basis of land he has recently purchased, with a reduction of 20 per cent. for its shape.

“There is something in the contention that for Robinson's business the triangular piece of land is as valuable as if it were square, but I cannot ignore the fact that its real value is much less. I propose valuing lot No. 38 on the same basis. The land has at present no track, but I see no reason why the spur should not be taken across Wesley Street. The reduction of 20 per cent. is because the track if extended would reduce its frontage area about this amount.

“The lot No. 35 I value at \$175 per foot, which, as the track could not be brought to it, is, I consider, a fair price.

“I allow the full amount of money claimed for improve-

ments, less \$1,500 legal expenses which should not be considered, as it was owing to the success of these legal proceedings that the property has its present value.

“These improvements are not worth this amount, but I think it fair to place Robinson in his new yard with equal facilities for doing business, and let the fact that they are new stand against the cost of the removal.

“I shall allow the further amount of \$10,000 for extra cost of doing business in a different location. The evidence shews that the property he has recently acquired is not large enough and he will have to have an additional yard. The evidence also shews that the land on George Street is the nearest track property of sufficient size he can obtain, and that the actual cost of teaming to his customers from this point is quite \$5,000 per year. I consider that two years is a fair time to give him to adjust his business to the new conditions and therefore award \$10,000.

“I cannot allow the claim for compulsory sale because I consider he is being paid a good price for the land.

“I cannot allow interest because the land has not been taken over, and apparently there is no legal justification for doing so.

“I cannot allow the loss of business for the reason already stated.”

Judging from the fact that, except as to the interest, the award is exactly for the amount which it would work out at on Mr. Galt's reasoning, I think it fairly conclusive that, except as to the allowance of interest, that reasoning was followed by himself and Mr. Macdonald in making the award.

Dealing with the question of the evidence, it seems to me settled by the case of *Atlantic & N. W. R. v. Wood*, [1895] A.C. 257, that it was not the intention of the legislature, by section 209 of the Railway Act, that a Court of Appeal should consider all the evidence *de novo*.

In the above case Lord Shand, in giving the judgment as to the interpretation of this same section 209 (which at that time

was section 161 of the Railway Act of 1888) says, at page 263: "It would be a strained and unreasonable reading of the words of the statute 'as in a case of original jurisdiction' to hold that the evidence was to be taken up and considered as if it had been adduced before the Court itself in the first instance and not before the arbitrators, and entirely to disregard the judgment of the arbitrators, and the reasoning in support of it. Such a reading of the statute would really make the Court the arbitrators and the sole arbitrators in every arbitration in which an appeal on questions of fact was brought against an arbitrator's award. It appears to their Lordships that this was not the intention of the legislature and that what was intended by the statute was not that the Court should entirely supersede and take the place of the arbitrators, but that they should examine into the justice of the award made by them on its merits on the facts as well as the law."

Lord Shand adds to the above: "And it is worthy of notice that the enacting words of sub-section (2) of section 161 are followed by this provision of sub-section (3); 'Upon such appeal the practice and proceedings shall be as nearly as may be the same as upon an appeal from a decision of an inferior Court to the said Court.'"

The sub-section (3) referred to by Lord Shand is sub-section (2) of section 209 of the present Act.

In view of the above decision I consider that we must treat the decision of the arbitrators, if not as that of a jury, at least as we would that of a Judge of first instance; and, so doing, there is plenty of evidence to support their finding as to the value of the land to the claimant.

Mr. Galt says, as to lot 38, that he values it at the same figure per foot frontage as he does the triangle, because of its having the right to track facilities. The evidence does not, I think, support him in the view that the claimant was entitled to the extension of the spur track across Wesley Street to this lot. I think, however, that the arbitrators should not have treated it,

or lot 35, as a separate property from the triangle. While actually divided by the street from the triangle, they were part of the claimant's same wood yard. In point of distance, lot 38 is nearer to the end of the spur track than a large part of the triangle is and should, I think, have been held nearly as valuable as the triangle itself. For that reason, and for the reasons I am about to state, I would not disturb the arbitrators' finding as to its value.

The claim of the railway that the \$10,000 allowed for extra haulage, is also included in the price of the land, seems to me to fail and should not be upheld if I am right in the view I take that the arbitrators, in finding the value of the land, did not include any contingent claim of any kind.

As to the claim that interest should not have been allowed the claimant, I think the railway company's contention should be upheld, though it is probable that, from the 1st of May to the 1st of July, the claimant's possession was not of as much use to him as it would be during that same period of the year if it were intended that he should continue the owner of the land.

The question of interest has been dealt with in a number of cases, though the circumstances do not seem, in any of them, to be similar to those of this case. In *Leak v. Toronto*, 26 A.R. 351, 30 S.C.R. 321, the claim was not for the taking of land of the claimant, but for injuries done to the claimant's land by the city's works, and, although the damages were ascertained at a considerable length of time after the injury was done, the Courts held that no interest could be allowed on the amount so ascertained, because the claim was in the nature of one for a tort and, by the ordinary rule of law, such claims do not bear interest.

It was held by Sir John Romilly in *Regents Canal Co. v. Ware*, 23 Beav. 575, that the compulsory notice of intention to expropriate and the subsequent settling of the price to be paid make a statutory contract for the sale of the land, and that decision has been upheld in the subsequent cases.

In *Re Eccleshill Local Board*, 13 Ch.D. 365, the claimants

were reversioners. Their tenants were in possession. The amount of compensation for taking was ascertained by a jury, under the provisions of English law. Some considerable delay arose, on the part of the Board, in taking possession owing to questions as to the sufficiency of the reversioners' title. Nevertheless, it was held that the reversioners could claim interest on the amount of the verdict from the time it was rendered.

That holding was questioned by Sir George Jessel in *Re Pigott v. Great Western Railway Co.*, 18 Ch.D. 154, where he held the company liable for interest only from the time when they might prudently have taken possession, though that happened some time after the award was made.

In the present case the statutory contract could not be complete until the award was made on 11th July; and, though the claimant had but little valuable use for the land during the period from 1st May to 1st July, yet he was in possession during that period. I am unable, therefore, to see on what principle interest could be allowed. The arbitrators might, perhaps, have made him an allowance for disturbance to his business during that period; but they have not done so and as they are not obliged to do so, I do not see that we could treat as compensation of that kind this sum they allowed as interest.

The claimant contends that, as the \$350 per foot frontage on the triangle has been found to be its actual value to him, the arbitrators acted on a wrong principle in taking off the 20 per cent. because of the shape of the land.

He further contends that, there being track facilities to the triangle, and lot 35 being part of the yard, lot 35 should also have been valued as if it had track facilities, and not at only half of the value per foot frontage placed on lot 38.

And, thirdly, he sets up that, in addition to allowing him for the value of the land to him, the arbitrators should have allowed him a further sum equal to 10 per cent. of that value as compensation for having to submit to the compulsory taking.

As to the first contention, the law, I think, is distinct that,

in case of a compulsory taking of land in the way this has been taken, the price should be fixed at its actual value to the occupier, or owner, making the claim.

In the case of *Ricket v. The Directors of the Metropolitan Railway Co.*, L.R. 2 H.L. at page 205, Lord Westbury states the principle as follows: "It is clear that if the railway company in the exercise of its statutory power took the public house entirely it would have to pay for it according to its value as a public house and the interest of the occupier therein would be estimated with reference to the value of the custom of the public house . . . The trade or custom is a thing appertaining to the premises and not to the person of the occupier, but all things pertaining to the premises are part of the premises and included in the interest of the occupier."

In *Commissioners of Inland Revenue v. Glasgow and S. W. Ry.*, 12 A.C. 321, Lord Halsbury says: "In treating of that value, the value under the circumstances to the person who was compelled to sell (because the statute compels him to do so) may be naturally and properly taken into account; and when such phrases as 'damages for loss of business' or 'compensation for the good will taken from the person' are used in a loose and general sense they are not inaccurate for the purpose of giving verbal expression to what everybody understands as a matter of business; but in strictness the thing that is to be ascertained is the price to be paid for the land—that land with all the potentialities of it, with all the actual use of it by the person who holds it, is to be considered by those who have to assess the compensation."

The same principle was followed by Mr. Justice Burbidge in the case *The King v. Rogers*, 6 Can. Ry. Cas. 409. In that case the Crown expropriated a hotel licensed to sell liquors. The license was an annual one. It could be renewed in favour of the owner or, if he died, of his widow; but no license could be granted to any other person. If the owner sold the property the use to which he put it could not be continued. The learned

Judge held that, while this particular use of the property added nothing to its market or selling value, it enhanced its value to the owner at the time of the expropriation, and that such was an element to be considered in determining the amount of compensation to be paid.

From the foregoing it seems to me clear that the amount that should have been allowed the claimant was its value to him. The third and sixth paragraphs of Mr. Galt's reasons seem to me to shew that the arbitrators held that the value to the claimant was \$350 per foot frontage. If so, they would have been right in allowing it. When they departed from this, however, as it seems to me that Mr. Galt's statement shews that they did, to ascertain and allow only the ordinary selling value of the property, they acted on an incorrect principle. I would increase the amount allowed, in respect of the triangle, by restoring to it the 20 per cent. which the arbitrators took off.

Then as to lot 38. It is as near to the track facilities on the triangle as some parts of the triangle itself are; but, on the other hand, no part of it actually adjoins the spur track; so that the haul to it is, perhaps, on the average, further than the haul to the different parts of the triangle, because those portions of the triangle adjoining the spur track would probably be used the most. On that consideration I do not think that, if it were not for the way in which the value of lot 35 has been arrived at, I would reinstate the 20 per cent. taken off the value of lot 38.

Lot 35 is, as already stated, also part of the one property with the triangle, although not exactly adjoining it. It is, however, across the street from part of the triangle, and it undoubtedly got the benefit of the spur track, although not to the same extent as lot 38 did. I think it should have been valued on that principle and that the arbitrators, therefore, did not allow enough for it when they only put it at half of the value of lot 38; that is, at \$175 per foot.

As the arbitrators have, I think, undervalued this lot 35, while possibly overvaluing, to some extent, lot 38 when putting

it as of the same value per foot frontage as they did the triangle, it seems to me that a fair way to deal with the matter would be to reinstate the 20 per cent. taken off lot 38 and to leave lot 35 as it stands. I think the result would be about the same as if both lots were properly valued.

As to the 10 per cent. which, it is claimed, should have been added for compulsory taking. There has grown up in England a custom of allowing 10 per cent. under such circumstances as these. But I do not look upon such an allowance as being one which the arbitrators were necessarily bound to make and, therefore, while they might have given it had they chosen, I do not, in the absence of direct evidence that they meant to do so, see my way to interfere by now allowing it.

The result of my opinion, therefore, is that the 20 per cent. taken off the value of the triangle and lot 38 should be reinstated and added to the amount allowed the claimant by the award, and that the interest allowed the claimant should be disallowed and taken off the amount allowed by the award, and that the amount of the award should be altered accordingly.

PERDUE, J.A. :—This was an appeal and cross-appeal from the award of arbitrators appointed under the provisions of the Railway Act to settle the amount of compensation to be allowed for lands taken for railway purposes. The land comprised a triangular block and two lots near the Canadian Northern Railway station in the city of Winnipeg. The triangular block was provided with track facilities and had, along with the two lots in question, been used for some time by the owners as a coal and wood yard.

The board of arbitrators appointed in this case was an exceptionally strong one. It comprised three well-known business men of high standing and great experience. The amount involved was very large. A great mass of evidence was received and exceptional care seems to have been taken in making up the award. The total amount awarded by way of compensation for

the taking of the lands was \$112,790, and interest at five per cent. per annum was allowed from 1st May, 1907, to 1st July, 1907, amounting to \$939.88. The award was signed by Mr. Galt and Mr. Macdonald, two of the arbitrators, Mr. Christie, the arbitrator appointed on behalf of the railway company, declining to sign.

Each arbitrator had drawn up a memorandum in writing setting out his views and stating the amount which, in his opinion, should be awarded. These documents were before the Court as part of the material used on the appeal. It was plain that the views of Mr. Galt, the third arbitrator, as to the amount to be awarded were those which were finally acceded to by Mr. Macdonald and embodied in the award.

On the appeal the owner of the property contended that he had only been allowed the market value of the same instead of of being allowed what it was worth to him, and that he had not been awarded anything for compulsory taking of the land. The basis of this contention was Mr. Galt's memorandum shewing how he had arrived at the amounts mentioned in it, which amounts had been adopted for the purposes of the award. It was claimed that he, after arriving at a valuation of \$350 a front foot for the triangular block, had deducted twenty per cent. from such valuation on account of the triangular shape of the property. There was sufficient land in the triangular portion to form a rectangular piece of land of the depth of a lot and as long as the side of the triangle fronting upon Wesley Street, or about 266 feet. It was contended that the shape of the land was no detriment when the land was used, as it had been, for a coal and wood yard, and that it was as valuable to the owner for his purposes as a rectangular piece of the same area.

After a careful consideration of Mr. Galt's memorandum, I think his meaning was that the land was worth to the owner the price he has placed upon it, not that that was its market value. He expressly states the opinion that the property, con-

sidered merely as land, is not very valuable. He does not regard it as desirable for business purposes and therefore its market value is not high.

The owner had recently purchased two lots on Victoria Street for a yard, paying \$350 a front foot for 100 feet. Mr. Galt says that for the business of the owner the land in question is about as good as the land on Victoria Street. He does not say, however, that the whole triangle of land in question should therefore be valued at \$350 a front foot. He only proposes to allow that price with a deduction of twenty per cent. on account of the shape of the land. His meaning, I think, is that if 20 per cent. be deducted from the triangle on account of its shape the balance will be as valuable, foot for foot, for the purposes of the owner, as the Victoria Street land. He evidently intended that the price he fixed should cover all claims for the taking of the land, except for improvements and increased cost of doing business in a different location. The claim for compulsory sale was refused because he considered the owner was being paid a good price for his land. The valuation allowed was, in Mr. Galt's opinion, high enough to cover the value to the owner and also the claim in respect of a compulsory sale.

The property in question was, on account of its position, exceedingly hard to value. No similar property had been placed on the market. The valuation of the triangular portion made by real estate experts who gave evidence ranged from \$40,000 to \$133,500, or from \$150 to \$500 a front foot on a frontage of 266 feet. The arbitrators were capable men and they seem to have given much time and attention to the matter. Unless they manifestly erred in some principle in arriving at their conclusion their award should not be disturbed. I do not think there was any sufficient ground shewn for interfering with the valuation they placed on the land or the amount allowed for improvements and for injury to business.

The interest awarded by the arbitrators upon the amount found due for compensation must be disallowed. At the time

the award was made the owner was still in use and occupation of the land. It may be that the proceedings taken by the railway company had interfered with the business of the claimants by rendering the tenure of the land uncertain, thereby curtailing their operations. But a claim for this loss, if any, could only be dealt with by the arbitrators when making up the amount of compensation to be allowed. It is not a justification for adding interest upon the amount awarded. The arbitrators should make up the amount to be awarded and should not add interest upon that amount or declare that it shall carry interest. I would refer to *Re Leak v. Toronto*, 26 A.R. 351, affirmed, in the Supreme Court of Canada, 30 S.C.R. 321.

The item of \$939.88 for interest should therefore be struck out and the amount of the compensation awarded left at the sum of \$112,790, but in other respects the award should stand. The appeal of T. D. Robinson and Robinson & Sons should be dismissed. The Canadian Northern Ry. Co. will be allowed \$100 to cover all costs in respect of the item as to which they succeeded.

PHIPPEN, J.A.:—I concur in the judgment of my brother Perdue.

The best opinion I can form of Mr. Galt's memorandum, which, apart from interest, was undoubtedly the basis of the award, is that he endeavoured to allow Mr. Robinson what he believed to be full compensation for all damage caused by the taking of his property, not on the basis of the selling price of the land, but having regard to its worth to Mr. Robinson for business purposes. Mr. Galt does make reference to two matters with which, were they the real basis of the award, I might disagree; namely, the deduction of the 20 per cent. for the shape of the larger property and the valuation of lot 38 as a track lot.

Lot 38 is not track property. On the other hand, if the triangle is worth to Mr. Robinson for business purposes more than

its sale price, he is entitled to the higher value regardless of its shape. I do not think, however, Mr. Galt intended, in deducting the 20 per cent. and in allowing lot 38 as track property, to do otherwise than carry out the principle, which he lays down in the earlier part of his memorandum, of allowing Mr. Robinson adequate compensation for the loss sustained.

This being so, I hesitate before interfering with the award. The arbitrators are men of experience and business ability; they have had the advantage of hearing the evidence and their judgment in determining compensation for a business loss (because this and not the market worth of the property is the true issue) is entitled to the greatest respect. As I believe they adopted the principle that Mr. Robinson should be fairly compensated for his loss I cannot interfere with their decision, even if in reaching their conclusions they use expressions, which, unmodified, might amount to legal error. In the view I take of the memorandum, to give effect to either objection would necessitate a new arbitration, or an investigation of the whole case *de novo*.

These remarks do not apply to the question of interest, which was allowed as a separate damage and not as part of the compensation for direct business disturbance.

In order to expropriate this property it was necessary for the company to obtain an order from the Railway Commissioners. This order provided that the company should not disturb possession before May 1st. In their award the arbitrators state: "We allow interest from the 1st day of May, A.D. 1907, by reason of the provision in the said order made by the Board of Railway Commissioners of Canada, entitling the claimant to retain possession of the property until that date." The question of interest is not dealt with in Mr. Galt's memorandum, but appears to have been allowed in the award as an afterthought.

I am unable to accept the argument of the owner's counsel, adopted by the arbitrators, that the order of expropriation affects the company's liability in respect of interest. At the

time the order was applied for Mr. Robinson was carrying on business on the property about to be taken. Had the railway proceeded actively it appeared possible Mr. Robinson might be dispossessed most inconveniently. To protect him the order provided he should not be disturbed in possession until May 1st.

This provision was made for the owner's protection. It is a limitation only on the right of expropriation, and while it insures to Mr. Robinson certain enjoyment it does not purport, except by limitation, to alter the time or the terms of the company's possession.

The right of arbitrators to award interest must, to my mind, be determined by the provisions of the Railway Act. Their powers are purely statutory. If the Act empowers their award the award must stand, but equitable considerations will alter or extend their statutory jurisdiction.

The sections of the Act bearing on the question are in part as follows:—

192. sub-sec. (2). "The date of such deposit (referring to the deposit of the plan) shall be the date with reference to which such compensation or damages shall be ascertained."

197. "The arbitrators . . . shall be sworn . . . faithfully and impartially to perform the duties of their office and shall proceed to ascertain such compensation in such way as they or a majority of them deem best."

210. (Referring to a time after the making of the award) "If the company has reason to fear . . . the company may pay such compensation into Court with interest thereon for six months and may deliver to the clerk or prothonotary," etc.

(2) "Such conveyance or award shall thereafter be deemed to be the title of the company to the land therein mentioned."

213. "The compensation for any lands which may be taken without the consent of the owner shall stand in the stead of such lands."

214. sub-sec. (3). "If the order for payment is obtained within less than six months from the payment of compensation

into Court the Court shall direct a proportionate part of the interest to be returned to the company.”

215. “Upon payment or legal tender of the compensation or annual rent awarded or agreed upon to the person entitled to receive the same, or upon the payment into Court of the amount of such compensation, in the manner hereinbefore mentioned, the award or agreement shall vest in the company the power forthwith to take possession of the lands, or to exercise the right, or to do the thing for which such compensation or annual rent has been awarded or agreed upon.”

The Act does not authorize the company to take possession until the amount of the award is paid either to the owner or into Court. It proceeds upon the assumption that the owner shall retain possession until payment, and, if the right to possession is made by deposit in Court instead of by direct payment to the owner, that the railway shall pay interest *from the date of payment of the money into Court* until such time within six months thereafter as the money shall be distributed.

The only power conferred upon the arbitrators is to fix the damage as of the date of filing the plans. Damages thereafter developed are beyond their control. The issue is simply the value of the property on that date for business purposes if used for such, otherwise in fair market, and beyond this point, which the statute has fixed, neither law nor inclination will rightly carry us.

Some learned Judges dealing with similar questions appear to have attached importance to the date of possession. The circumstances under which these cases were decided doubtless justified the judgments, but the cases are not, to my mind, precedents under our Railway Act.

A railway company can only take possession before payment of the arbitrated compensation in one of two ways; by agreement express or implied, or as trespasser. If possession is under contract we must refer to the agreement to ascertain the penalties for its favours. If by trespass the punishment is not

to pay interest until the making of the award, but rather in damages, the amount of which must depend on the conditions of each case. The penalty for such a trespass must be determined by the Courts. It is not a subject for arbitration under the Act. The duty of the arbitrators is to fix the damages as of the date of the filing, not the compensation for subsequent torts. And in doing this they are limited by the terms of the Act. I am unable to concur with the judgment of Mr. Justice Riddell in *Re Cavanagh*, 14 O.L.R. 530. Whether the award itself carries interest does not arise on this appeal.

EXPROPRIATION—COSTS.

MANITOBA.]

[MATHERS, J.

CANADIAN NORTHERN R.W. CO. v. ROBINSON.

(17 *Man. R.* 579).

Costs—Arbitration under Railway Act—Taxation of costs—Railway Act, R.S.C. 1906, ch. 37, sec. 2, sub-sec. (5), sec. 199—Arbitrator's fees—Counsel fees—Fees of expert witnesses.

1. Under sub-sec. (5) of sec. 2 of the Railway Act, R.S.C. 1906, ch. 37, interpreting the word "costs" used in sec. 199 of the Act, as including fees, counsel fees and expenses, the costs of an owner who succeeds in an arbitration under the Railway Act should be taxed as between solicitor and client.
2. *Malvern Urban District v. Malvern* (1900), 83 L.T. 326, followed.
3. The tariff of costs prescribed for ordinary litigation may be accepted as a general guide for taxing the costs of such an arbitration; but when, in the opinion of the taxing officer, the fees fixed by that tariff are inadequate compensation for the services necessarily and reasonably rendered, he is not bound by it and should not follow it.
4. For the purposes of the taxation of such costs the arbitration began when the company served notice upon the owner offering an amount which they were willing to pay and naming its arbitrator, and items for work done even before that date should be allowed if they were for work that would properly be costs of the arbitration if done after that date; for example, Fee perusing the order of the Railway Commissioners giving leave to expropriate, and taking instructions.
5. The owner was entitled to tax the fees paid to the arbitrators on taking up the award.
6. *Shrevesbury v. Wirral*, [1895] 2 Ch. 812, distinguished.
7. Counsel fees allowed by the taxing officer were reduced to \$100 per day for first counsel and \$75 per day for second counsel.
8. The fees actually paid to expert witnesses should not necessarily be allowed, but only fair and reasonable fees for the time occupied in attending before the arbitrators and in qualifying themselves to give evidence.
9. The costs of the taxation, including a fee of \$25 for the argument before the Judge, should be borne by the company.

APPLICATION to tax the costs of an arbitration under the Railway Act.

A. B. Hudson, for the plaintiffs cited *Hyde v. Manchester*, 12 C.B. 474; *Oliver v. Bay of Quinte Ry.*, 7 O.L.R. 567; *Bronson v. Can. Alt.*, 13 P.R. 440; *McMurchy & Dennison's Ry. Act* 221, and *Re Beaty*, 13 P.R. 316.

O. H. Clarke, K.C., for the defendants cited *Re Beaty*, 13 P.R. 316.

MATHERS, J.: — On an application to tax the costs of an arbitration under the Railway Act I adopted the practice which is well established in Ontario, and referred the bill to the senior taxing master: *In re Oliver v. Bay of Quinte Ry.*, 7 O.L.R. 567. The parties afterwards applied to me for a direction to the taxing officer as to the principle on which these costs should be taxed, whether as between party and party or as between solicitor and client.

The land owner is, under section 199 of the Act, entitled to the "costs of the arbitration" and by section 2, sub-section 5, "costs" includes "fees, counsel fees and expenses." This latter sub-section defining costs was added as an amendment in 1903. Prior to that a party entitled to costs could only claim them as between party and party: *Re Bronson v. Canada Atlantic Ry.*, 13 P.R. 440, and *In re Oliver v. Bay of Quinte Ry.*, *supra*. The question is, has the amendment made any difference? Reading section 199, as interpreted by sub-section 5 of section 2, the proprietor is entitled to the costs, fees, counsel fees and expenses of the arbitration. The expression "full costs and expenses" would mean solicitor and client costs, as applied to the Railway Act: *Hyde v. Mayor of Manchester*, 12 C.B. 474, though it would not be so with respect to ordinary litigation; but "all costs incidental to the arbitration" would not: *Re Bronson v. Canada Atlantic*, *supra*.

By section 34 of the Lands Clauses Consolidation Acts, 1845, the successful party becomes entitled to "all costs of any such

arbitration and incidental thereto" and under it taxing masters usually adopt a method of taxation less liberal than solicitor and client costs, but more liberal than between party and party: *Brown & Allan on Compensation*, 63. In *Malvern Urban District v. Malvern*, 83 L.T. 326, the question arose upon an agreement between a district council and a gas company, confirmed by a private Act of Parliament, for the purchase by the council of the company's undertaking, the price to be ascertained by arbitration. Clause 7 of the agreement was as follows: "7. The council shall pay all the costs, charges and expenses of the company preliminary and incidental to the negotiations for the sale and the preparation and execution of this agreement and the said arbitration, the same to be taxed in case the parties differ."

It was held by the Court of Appeal that the costs given by this section should be taxed on the solicitor and client scale, as by that means the intention of the parties that the company should come out of the business as nearly as possible scathless would best be given effect to.

Prior to the passing of section 2, sub-section 5, of the Railway Act, the ordinary party and party costs of the arbitration were taxed to the successful party on a liberal scale it is true, but still as between party and party.

In this state of the law sub-section 5 of section 2 was passed. It would be difficult to assign a reason for this amendment unless it were intended to give to the successful party something to which he was not previously entitled. The agreement in the *Malvern case* provided for "All the costs, charges and expenses of the company preliminary and incidental to . . . the said arbitration." While these words, in so far as they refer to preliminary expenses, may be wider than the words "costs, fees, counsel fees and expenses of the arbitration," the words used in the Railway Act as interpreted by the amendment referred to, I cannot see that they are otherwise in effect different. I can see no difference between "costs" and "all costs." Both expressions to my mind mean the same thing.

I have come to the conclusion, therefore, that the principle of taxation of costs to be applied under the Railway Act has been changed by the addition of sub-section 5 of section 2. Such costs should now be taxed as between solicitor and client, that is to say, the party entitled is to have all the costs and expenses he may have reasonably incurred, or, as stated by Williams, L.J., in the *Malvern case*, "all the reasonable costs which a prudent man would incur in the matter."

All authorities agree that where land has been taken compulsorily the costs should be taxed on a larger scale than in ordinary litigation. Everything that was necessarily or reasonably done and every expense that was necessarily or reasonably incurred in order to properly present a party's case to the arbitrators should be allowed to him in taxation. But of course he should not be allowed for unnecessary work or expenses, or for costs incurred through over caution, or, as said by Smith, L.J., when "he has indulged in luxuries of costs."

The tariff of costs prescribed for ordinary litigation may be accepted as a general guide; but where, in the opinion of the taxing officer, the fees fixed by that tariff are inadequate compensation for the services necessarily and reasonably rendered he is not bound by it and should not follow it.

With these general directions I leave the matter with the taxing officer.

After taxation the matter was brought before Mathers, J., for confirmation of the taxation.

O. H. Clarke, K.C., for the defendants cited *Jamieson v. Trevelyan*, 10 Ex. 748; *Avery v. Wood*, [1891] 3 Ch. 115; *Malvern Case*, 83 L.T. 326; *Re Grundy*, 17 Ch. D. 108; *Re McRae*, 12 P.R. 282; *Heaslip v. Heaslip*, 14 P.R. 165; *Re Bronson*, 13 P.R. 440, and *Shrewsbury v. Wirral*, [1895] 2 Ch. 812.

H. Ormond, for the plaintiff cited *Brice v. C.P.R.*, 7 W.L.R. 143; *Hudson on Compensation*, 1571; *Autothreptic Co. v. Townsend*, 21 Q.B.D. 183; *Redman on Arbitration*, 167; *Mackley v.*

Chillingworth, 2 C.P.D. 273; *Churton v. Frewen*, 15 W.R. 559; *Smith v. Buller*, L.R. 19 Eq. 473, and *Batley v. Kynock*, L.R. 20 Eq. 632.

April 10, 1908. The following judgment was delivered by MATHERS, J.:—This is an arbitration proceeding under the Railway Act. A short time ago the parties applied to me to tax the costs of the proceeding under section 199 of that Act. Following the well settled practice in Ontario, I referred the bill for taxation to the senior taxing officer. He has completed his taxation and the matter now comes before me for confirmation.

Counsel for the railway company raised several objections to the bill as taxed by the taxing master. In the first place he contends that work has been allowed for which was done before the arbitration began and, as the Act only gives the costs of the arbitration, there is no right to tax costs anterior to the commencement of that proceeding. In substance I agree with this contention, but I cannot agree that the arbitration only commenced when all the arbitrators had been appointed. In my opinion the arbitration began when the company served notice upon the owner offering an amount which they were willing to pay and naming their arbitrator. This notice was served on the 31st October, and all the items taxed prior to that are for work that would properly be costs of the arbitration if performed after. For example, Fee perusing the order of the Board of Railway Commissioners giving leave to expropriate, and taking instructions, are both proper charges in the arbitration proceeding and would have been taxed without question, if they had been charged in the bill subsequent to the 31st October. I think under the circumstances the taxing officer was justified in allowing these items.

It was also objected that, because the owner paid the arbitrators' fees and took up the award, he is not now entitled to recover these fees from the company. In support of that contention the case of *Shrewsbury v. Wirral*, [1895] 2 Ch. 812, is

relied upon. That was a case under the Land Clauses Act, 1845, and it was held that the owner, having paid the arbitrator's fees and taken up the award, was not entitled to recover such payment from the company. That conclusion was arrived at upon the construction of section 35 of the Land Clauses Act, which is as follows: "The arbitrators shall deliver their award in writing to the promoters, who shall retain the same and shall forthwith on demand, at their own expense, furnish a copy thereof to the other party to the arbitration, and shall at all times, on demand, produce the said award and allow the same to be inspected or examined by such party or any person appointed by him for that purpose." It was held that that section made it the duty of the promoters to take up the award and pay the arbitrators' fees; that no such duty was cast upon the owner; that he had no right to the award and if, by payment of the fees, he had got possession of it his payment was a purely voluntary act and he had no right to recover it. The Court further held that his proper course was to have applied for a *mandamus* to compel the promoters to pay the fees and take up the award. The Canadian Railway Act contains no provision at all equivalent to this section 35. Here, either party has a right to take up the award. The arbitrators have a common law lien upon the award for the amount of their fees and they cannot be compelled to surrender it until these fees are paid. Even under the Land Clauses Act it is held that the lien still exists: *Queen v. South Devon Ry. Co.*, 15 Q.B. 1043; *Queen v. London & Northwestern Ry. Co.*, [1894] 2 Q.B. 512. As under the Railway Act there is no duty cast upon the company to pay the fees and take up the award they could not be compelled to do so. If the owner desires to proceed upon the award he must pay the arbitrators' fees before he can get possession of it. Such a payment cannot be considered as a voluntary payment and therefore I think the taxing officer was right in taxing these fees as part of the costs of the arbitration.

The other point raised by the counsel for the railway com-

pany was at to the *quantum* of the counsel fees allowed. The arbitrators appear to have had fourteen meetings at which counsel were present. These meetings, I am led to believe, were of about two hours' duration each. For ten of these the taxing officer has allowed for first counsel \$150 each and for four of them \$100 each. Second counsel was present at twelve meetings, for eight of which \$100 each is allowed and for four \$75 each; making a total of \$3,000 allowed for counsel fees. The case was one of great importance, involving a large sum of money and a great amount of labour and careful and unremitting attention on the part of counsel. The time spent during the hearing of the evidence was no doubt but a small fraction of the time which counsel had to necessarily spend in preparation for the meetings of the board. The learned taxing master informs me that he allowed these large fees because of the magnitude of the questions involved and the amount of work which it appeared had devolved upon counsel in the proper preparation and presentation of the case. I have great reluctance in interfering with the decision arrived at by a taxing officer of such large experience—an officer in whose judgment the Court has the greatest confidence—particularly when that conclusion was arrived at after deliberation. Were this an ordinary appeal from his taxation I would not hesitate to refuse. In this case, however, the responsibility is mine; and, while the costs in proceedings of this kind should be allowed on a liberal scale, I think the taxing officer has erred on the liberal side. If counsel had been engaged for the entire day, either in preparing or attending before the arbitrators, it seems to me the fees allowed are in excess of what he would be entitled to. If \$100 per day is allowed for first counsel and \$75 per day for second counsel, the allowance would, I think, still be liberal. On this scale there should be \$500 taken off the first counsel fees and \$200 off the second, making a total reduction of \$700.

The owner objected to the taxation of the witness fees. Evidence was produced to shew that one expert witness had been

paid \$150 and several others \$50 each. The taxing master allowed in respect of these fees only \$25 each. The cases cited on behalf of the owner do not bear out his contention that he should be allowed the amount actually paid. They shew that a fair amount may be allowed to an expert witness for the purpose of qualifying himself to give evidence; but what is a fair amount should be settled by the taxing master in view of all the circumstances. I have discussed with the taxing officer his reason for arriving at the conclusion he did with respect of these fees, and it appears to me he has exercised a proper discretion.

The costs of taxation should be borne by the company. For the first argument before myself I allow a fee of \$25; for the taxation before the taxing master, after consultation with him, I fix the costs at \$25. I think there should be no costs of the subsequent argument before myself.

The net result will be that the bill as taxed by the taxing officer at \$5,242.09 will be reduced by \$700, leaving \$4,542.09, to which should be added \$50 allowed for taxation, leaving the net bill \$4,592.09.

EXPROPRIATION—ARBITRATION AND AWARD— DAMAGES.

NOVA SCOTIA.]

[SUPREME COURT.

BEATON v. MABOU & GULF R.W. Co.

(41 N.S.R. 429).

BEFORE TOWNSHEND, J., GRAHAM, E.J., AND MÉAGHER AND
RUSSELL, JJ.

*Railway land damages—Arbitration and award—Payment into Court—
Costs.*

In an action brought by plaintiff claiming damages for lands taken for railway purposes, part of plaintiff's claim had been the subject of arbitration and award, but it appeared that part of the work of construction preceded the filing of the expropriation plans.

Held, that plaintiff was entitled to recover for all damages which could have been legitimately excluded from the consideration of the arbitra-

tors, and that plaintiff's claim could not be deemed to have been satisfied by an award for injuries which would not have formed a legitimate subject for the consideration of the arbitrators. Defendant paid into Court a sum of money which the trial Judge held insufficient, but which the Court, under the evidence, thought excessive, if not the extreme limit of any damage of which there was reasonable evidence. *Held*, in respect to this portion of the judgment appealed from, that defendant's appeal must be allowed with costs.

APPEAL from the judgment of Fraser, J., in favour of plaintiff in an action claiming damages for trespass to land.

The facts are fully set out in the judgments.

A. A. Mackay and J. A. H. Cameron, in support of appeal. The overflow was not caused by the obstructing of the streams, but by the rainfall on the slope. It is not shewn that any damage resulted from the removal of the fences: *City of Montreal v. McGee*, 30 S.C.R. 589; *Anctil v. City of Quebec*, 33 S.C.R. 347; *Darley Co. v. Mitchell*, 11 App. Cas. 127; *Serrao v. Noel*, 15 Q.B.D. 549. Damages for the overflow are included in the compensation: *Knapp v. G. W. Ry. Co.*, 6 U.C.C.P. 187; *Wallace v. Grand Trunk Ry. Co.*, 16 U.C.Q.B. 551. The plaintiff has been guilty of laches under section 278 of the Railway Act: *Follis v. Port Hope & Peterborough Ry. Co.*, 9 U.C.C.P. 50; *Township of Brock v. Toronto & Nipissing Ry. Co.*, 37 U.C.Q.B. 37; *McArthur v. Northern Junction Co.*, 17 A.R. 6; *Ryckman v. Hamilton, Grimsby & Beamsville R.W. Co.*, 4 Can. Ry. Cas. 457; MacMurchy and Denison's Can. Ry. Act, Annotated, p. 474. As to a continuing injury see Underhill on Torts, Can. ed. p. 128; *Patterson v. G. W. Ry. Co.*, 8 U.C.C.P. 89; *Kerr v. Atlantic & N. W. Ry. Co.*, 25 S.C.R. 197.

H. Mellish, K.C., and W. F. O'Connor, contra. Section 278 of the Railway Act is not applicable to this case. The entry in 1902 was not under the statute, and did not purport to be. They had no right to enter until preliminary proceedings had been taken: *Beard v. Credit Valley Ry. Co.*, 9 O.R. 616; *North Shore Ry. Co. v. McWillie*, 17 S.C.R. 511; Abbott, p. 269. The overflow was not caused by the rain on the slope, but was col-

lected by the conduits of the defendant and allowed to overflow. This is a continuing injury: Addison on Torts, p. 370; *Whitehouse v. Fellows*, 10 C.B.N.S. 83-4; *Thompson v. Gibson*, 7 M. & W. 456. The plans must be filed: Sec. 139 of Ry. Act; *Calder v. Midland & Beach Ry. Co.*, 23 C.L.T. 18; Kerr on Injunctions, p. 113; Addison on Torts, p. 61. There was trespass in breaking the fences. These acts were all done before the property vested in the company: Ry. Act, sections 88, 85, 86, 119, 124, 125, 138, 139, 140, 278, 179; Special Act, sections 25, 28, 29, 37, 41. Compensation applies only to land taken by agreement.

A. A. Mackay, in reply. The acts were done *bonâ fide* and not in violation of the rights of the plaintiffs: *Can. Pacific Ry. Co. v. Roy* (1902), A.C. 220; *Brown v. Grand Trunk Ry.*, 24 U.C.Q.B. 350; *Lloy v. The Town of Dartmouth*, 30 N.S. 208; *Cain v. Uhlman*, 20 N.S. 148.

March 16, 1907. GRAHAM, E.J.:—By virtue of the Act incorporating the defendant company, Acts of 1902, ch. 134, sec. 28, the company, by filing with the registrar of deeds of the county in which the lands lie, a plan of the lands required for right of way, station grounds, sidings and appurtenances (the plan being first approved of by the Governor-in-Council) became vested with lands as if they had been deeded to the company. In case the municipal council by resolution authorized the acquisition of the lands, with a view to assist the company by paying for the right of way (which it did in this case), the owners or the proprietors of the land "should thereupon only have recourse for the compensation therefor or for the damages arising from the taking of the lands, against the municipality."

Sections 29, 30 and 31 made provision for three arbitrators assessing the land damages.

By the Acts of 1903, ch. 38, the resolutions of the municipal council were ratified and confirmed, and, among other things, these resolutions provided that the municipality would furnish

free to the company the lands required for the track, stations and terminals, etc. The land so taken for the said track should not be more than 100 feet in breadth, except where more was required for slopes, excavations and embankments, and where it might be deemed advisable to alter the line, etc., in which case a further quantity might be taken, not to exceed five acres.

By 1902, ch. 134, sec. 36, the company or its contractors might enter upon lands and deposit soil, etc., and dig up and carry away materials for making and repairing the railway, upon notice, etc., with a provision for subsequent compensation.

By the Railway Act, R.S. 1900, ch. 99, provision is made for a company acquiring additional or extra land, and the procedure for its acquisition is pointed out.

Under 1902, ch. 134, s. 32, there is provision made for assessing the land damages in such a case against the company which was to be used rather than the provisions contained in the Railway Act.

Under the Special Act of Incorporation there was taken from this plaintiff for right of way, lot No. 4, consisting of 5.86 acres. The plan (marked J. R.) was approved by the Governor-in-Council, and was filed with the registrar of deeds on the 4th of March, 1903.

On the 9th of August the three arbitrators, one appointed by the municipality, one by the plaintiff, and the other appointed by the other two, awarded to this plaintiff, among other proprietors, the sum of \$265. The solicitor of the municipality on the 27th of April, 1905, authorized the treasurer to pay this amount to the plaintiff in full compensation for the damages to his land, so far as the municipality was liable, and the plaintiff gave the treasurer his receipt in full.

The defendant company acquired, at the terminus, extra land belonging to this plaintiff. On the 22nd June, 1903, an order-in-council was made approving of the taking of the extra land. A plan and book of reference were filed with the registrar of deeds on July 2nd, 1903, and some 10.26 acres were taken.

On the 23rd August, 1903, an award was made allowing

damages in the sum of \$40 per acre in respect to this land, in all \$410, and this amount, with others, was under the statute paid into Court, at Port Hood, for the plaintiff, on the 5th of September, 1903.

The plaintiff on the 26th of July, 1904, brought this action. He had acquired this land at sheriff's sale on the 17th June, 1902; and the plaintiff claims \$1,000 general damages, and \$1,000 special damages.

The defendants set up the statutes and proceedings which I have quoted. They also set up a statutory limitation of one year for such actions under the Railway Act, R.S. 1900, ch. 99, sec. 278, and they have paid into Court the sum of \$200, and say that that is sufficient to satisfy the plaintiff's claim.

In the ordinary course the injuries which are dealt with in the evidence, and which it is necessary to consider, would be included by the arbitrators in assessing the damages awarded, as injurious affection to the plaintiff's premises. They were incidental to the construction of the road and would have been foreseen, and would form a legitimate subject of compensation. This would be so even in the case of the damage by concentrating and converging surface water, to which I shall refer presently: *L'Esperance v. Great Western Railway Co.*, 14 U.C.Q.B. 173; *Nicholas v. Canada Southern Railway Co.* 40 U.C.Q.B. 583.

But it appears that the work of construction, at least so far as the acts now complained of are concerned, preceded the filing of the expropriation plans. While the arbitrators, no doubt, proceeded as if the expropriation had taken place before entry upon the land, I think that the plaintiff in this action is entitled to recover for all damages which could have been legitimately excluded from the consideration of the arbitrators; and that the plaintiff cannot be deemed to have been satisfied by the awards for the injuries which would not have formed a legitimate subject for their consideration, such, for instance, as those injuries which had already depreciated the value of his land at the time of the expropriation, and would not recur again as continuing injuries.

Coming, then, to the damages; first in connection with the right of way, namely, lot 4, consisting of 5.86 acres, it appears that this consists of part of the railway line, some 24,875 feet, curving down into his property through his northern side line. It skirts along the side of a steep slope, which drops towards a brook, there being about as much land between the railway limits and the brook as there is in the right of way itself, although it, of course, varies in width. It was land fit and used only for pasture, and there was no trace of cultivation.

1. On part of the intervening land there was a road—a wood road or a cattle road—for it is shewn not to be wide enough for wheels, in at least one place. It ran from the front to the rear of the farm into woods. It appears that there was an overflow of the stones which came from a rock cutting above, where they were dumping at an embankment and some of them rolled down and rested even outside of the railway fence.

The plaintiff's surveyor and the plan shewed the whole area covered by the stones to be 114 feet by 35 feet, about one-tenth of an acre, but part rested on the road.

It appears that the company at this point, owing to the slope, expropriated an additional strip, outside of the 100 feet in width namely, a strip 23,627 feet in length by 30 feet in width. This is not within the railway fences. The stones complained of as well as the wood road at this point, are all within the limits of the company's land. And this land is included in the 5.86 acres for which the defendant has been awarded damages. This fact is, perhaps, not very material if the defendant was only paid the depreciated value.

The plaintiff's surveyor displayed some ingenuity in his estimate of the damages, and the plaintiff and his witnesses followed his lead. His idea is based on not using the road itself to haul these stones away, but only on putting them back. This, he says, would require a cribwork along the bank inside of the fence in which to put the stones. This, in itself, he said, would cost \$125. But it would cost three or four times more, he said,

to construct the wood road in another place. Two bridges would be necessary. However, after the defendant's witnesses had testified, the plaintiff put a witness in the box who proved that he would remove the stones off the path for \$40. I have read very carefully the whole evidence as to all the stones outside of the fences, including those upon the strip of additional land, and taking the engineer's estimate I think that \$20 would be a very liberal allowance for removing them all. There are, at the outside, everywhere, according to the estimate of the engineer, 34 cartloads, including 13 loads which the plaintiff's witnesses did not mention, and there is an estimate given of \$5 for moving ten loads.

As a matter of fact, looking at the land and its locality and value, no prudent owner would ever think of moving them. He would abandon the one-tenth of an acre, worth at the most, according to other valuations, not more than \$4. He might move those which constituted an obstruction on the wood road, and this, according to the evidence, could be done at a cost of \$5. The plaintiff was not sanguine enough to launch his case in respect to those stones otherwise than as an obstruction to his wood road. Then his idea was to restore them to the place whence they came and hold them with a valuable cribwork.

2. Then there is another claim. Three culverts were put in, crossing under this road bed at different points along the way, for drainage purposes, two 9-inch pipes, and a wooden culvert 15 inches by 9½ inches. The first pipe suffices for an outlet for water from an area of 16 acres of a watershed, the side of the slope; the second pipe, for an area of three acres, and the wooden culvert suffices for between three and four acres.

The outlets were all within the railway limits. These drains were constructed in proper places, namely, where there were natural depressions, and in one case, a natural water course generally dry. But whereas the water found its way to the brook before, down this same slope, and to some extent the depressions, it now is concentrated more by means of the usual

railway drains, and, going through the culverts, spreads below the outlet on the land, and there have been traces of sediment, sand and gravel, and the surface has been disturbed below the outlets.

The plaintiff's surveyor has also displayed ingenuity here. His theory is to put down a pipe drain four feet deep and cover it up, all the way down this steep slope to the brook, the length of one being 175 feet and the other 100 feet. Then he says that this land below the railway is injured to the extent of 25 per cent. and that there are seven acres. The engineer who measured it for the trial says that there are but five—a shade over five. With the exception of the testimony of one other witness for the plaintiff, one McMillan, who merely places the same estimate on the injury to the land below, namely 25 per cent., there is no other testimony on the part of the plaintiff.

Mr. Noble, the engineer called by the defendant, after stating generally that the culverts are properly constructed, says this about the damage:—

“Q.—Would it be possible, in your opinion, for any drainage to pass over the road bed in that locality? A.—Practically impossible, saving and excepting just at the rock cutting itself there might be a little running over for perhaps one hundred feet. I heard some evidence given here as to a deposit of sediment. I have examined this land very critically, and I had difficulty in observing any deposit of sediment, it was so very inappreciable. It was at this point at the first culvert I spoke of where, to my mind, it was a wonderful thing how the water got up. I observed there was a slight sediment extending over an area of 40 x 10 feet. It was a yellowish, sandy sediment. No doubt it came down from the ditch to the east of the railway, and in passing through it carried a slight sediment.

“Q. And do you say that if that natural bed on Beaton's land had been clear that there would have been no sediment? A.—It could not have possibly gone there, because the direction of the pipe was directly opposite the course to which the artifi-

cial bed is made. I think that possibly, in speaking, in fact, straining my conscience to make it as big as possible, I might get a barrel out with a shovel and a broom. That deposit was not in a hay field. It was rather on the steep barren part of the land there. There is nothing but short, stubby pasturage grass. It might be used as pasturage for sheep. The second one, as I said, the water passes through from the natural depression above to the natural depression below, and passes into the field, and there is slight evidence of sediment there; I would say almost slighter than the other—the same kind of yellowish sediment.

“Q.—Did you notice particularly what area was covered?
A.—It was so inappreciable that you could not possibly give any measurement at all. It was just a little sediment over a few feet. The upper, that is, the little box culvert, all the sediment that exists there is within the line fence of the railway, within the fifty feet below the centre of the railway line.”

I think that covered drains, from the culverts to the brook, in that rough land, are out of the question.

Also the idea of abandoning the whole seven acres to this surface water. This, however, would not, according to the arbitrators' valuations in the award and accepted by this plaintiff, yield more than \$75 damages.

But, for ordinary farming purposes, the area of land required for open drains from the culverts, dry during the greater part of the year, would be a very small fraction of the seven acres. I think that \$15 would be a very liberal allowance, and probably the damage should be confined to what took place before expropriation, namely, the cost of removal of the two barrels of sediment. The damage for the injury after the expropriation would be embraced in the award.

3. There is a claim for the destruction of the plaintiff's line fence, at the entrance and exit of the railway. It appears that rather more than the mere width of the railway was taken away because the road crosses the side line with a curve. Say, then,

three hundred feet of fencing and it was pasture fence. The kind of fence in the locality is shewn in the photographs. The company connected their own fence when it was constructed with the plaintiff's fence.

The value of this fence has to be taken into consideration, although the plaintiff would never have to replace it.

4. There is another claim, but it is in connection with the 10.26 acres lot. It appears that during 1902 the only thing the company did in connection with this area was to survey and stake it out, and the plaintiff says that it was tramped around. The plaintiff admits that he harvested his crop which he had upon part of it, viz., where the boiler and engine house now is, but he says it was "damaged some." He says: "I must have suffered \$20 for grain in 1902." His surveyor cannot help him about this matter, and it is about all the evidence there is on the subject. The expropriation plan was filed before the next haying season, namely, July 2nd, 1903. Here, too, the plaintiff complains of the breaking down of his line fences which he had on this lot. He says 300 or 400 yards, although, apparently, part of this belongs to the other lot. There is nothing very specific about this claim, and he admits that the public highway passed through this ten acre piece and was unfenced. It is not proved to have happened before the expropriation, and as he harvested his crop for 1902, it is possible that it did not. His claim in respect to the company not fencing the ten acres, and cattle coming in would be included by the arbitrators in their award. The sum of \$15 would more than cover both this and the other item of fencing.

5. The last claim is also in connection with this 10.26 acre lot. But it is apparently in respect to work done subsequently to the filing of the expropriation plan. The defendant erected a dam across a ravine in which runs the brook of which mention has been made, and the dam is fifty-two feet within its limits—that is down stream from the line. But it is claimed that there has been back flow, and that sediment has been left

on the plaintiff's land above, or rather in the bed of the brook, for it is just a narrow ravine, ten or fifteen feet wide, with steep banks covered with scrub bushes. Of the sediment of which the plaintiff complains, the plaintiff's surveyor says: "I did not see the water fall, but I saw a considerable amount of sediment there. About 30 or 40 feet from the face of the dam."

He did not measure the distance between the dam and the line.

As to the area of the sediment, he says:

"I am familiar with the ravine at 'B' on plan 2/R. It is very narrow there, and the banks are steep at that place. The banks on either side are covered with shrub bushes—partly covered. The ravine would not be more than ten feet wide at that particular point. Where the dam is situated it is a little wider. Q.—But up where the sediment is the ravine is very narrow? A.—Yes. Well, not very narrow. In some places it is not much more than 10 feet. But in other places it is fifteen feet. But I do not say there is fifteen feet of sediment. There is sediment under the water, but I have seen that much sediment over the water. There is no vegetation in that particular part. I cannot say if there is any hay land injured by this sediment; there could not be a great deal; certainly not more than ten—we will say there was ten by forty—four hundred square feet; I do not know if that was all hay land; I know that the brook has to be deducted out of that anyway. Probably the brook at spring and fall would occupy the whole forty by ten feet.

"Q.—That is the natural brook at a freshet, without any dam at all? A.—Yes, with a freshet without a dam. I did not examine the whole workmanship of the dam, but I have seen the dam overflow. I think the overflow was about five feet."

His theory as to its being on the plaintiff's land is based on an assumption about the line on the ground, of which he is not sure. Mr. Johnson, the assistant manager, explains that in constructing the dam it was estimated that the level of the water

going over the dam would not be as high as the level at the plaintiff's line. He says:—

“Now there is sediment going down and it is filling the dam, and the dam will eventually fill up, but even then, on the level, it will not go back past the line, and it is not back past the line now. I do not think there is any sediment on plaintiff's land.”

And in cross-examination:—

“Q.—I suppose you never took very much observation of this dam? A.—Yes, I have gone down there very often.

“Q.—Did you ever examine the distance between the edge of the dam and the line of your property? A.—Yes, it is about 52 feet.

“Q.—And how far back from that 52 feet mark did you find sediment on the ground? A.—Well, I found sediment all along the brook, but the sediment I would say came down there does not extend back past the 52 feet. I measured there very recently—yesterday.”

The sediment which Mr. Noble, the engineer, saw was not caused by the dam, as its elevation was higher, and, no doubt, due to freshet.

I have read the evidence very carefully, and I am satisfied that the dam has not caused the water to rise so far that it flows back upon the plaintiff's land, and deposits sediment on that land. And I think this claim ought to be dismissed.

In respect to the overflow of stones, the injuries from the converging of the surface water (except those caused within a year), the breaking down the fences, and the injury to the crop, it is contended that these are barred by the one year's limitation provided by R.S. 1900, ch. 99, sec. 278. The Ontario cases shew that it is applicable to injuries in connection with construction, but it is contended for the plaintiff that that section applies to protect a company only when it is acting *bonâ fide* in the belief that it is within its rights.

Here, it appears, that this entry and construction, involving all the facts which are under consideration at present, were performed before March or at least May, 1903.

The action was brought on the 26th of July, 1904.

It appears that the defendant company had an assignment of an agreement which another company, the Mabou Coal Mining Co., had taken from the land proprietors in respect to the right of way. The plaintiff was not then in occupation of this land, but his brother, Alexander G. Beaton, lived upon it with his mother and wife, and he did sign the agreement.

But it appears that his signature to it might be applied only to another bit of land which he actually owned. The agreement does not discriminate. That is the only claim of right which can be given to the company's construction work going on before the expropriation plan was filed.

Whether this section is a bar to this action is a matter not free from difficulty, and I propose to dispose of it on the other ground.

In my opinion the sum of two hundred dollars paid into Court exceeds the damages recoverable by the plaintiff in respect to the matters complained of, by \$100. The appeal ought to be allowed with costs, and the defendant to have judgment in the action, for costs subsequently to the payment into Court, and the plaintiff will have judgment for \$100 and the costs of action up to that time, to be set off.

MEAGHER, J., concurred.

RUSSELL, J.:—The plaintiff is claiming damages for trespass to his lands and the defendants justify under the Railway Act and the Special Act incorporating the company. It appears that a strip of land was taken out of what is now plaintiff's farm, for the purpose of the defendant's railway, the money payable therefor being a charge on the municipality, under the Act incorporating or Acts relating to the company, and that a further lot of land outside of the ordinary right of way was taken under the authority of the Railway Act. The plaintiff has received \$265, awarded for the ordinary right of way, and \$410,

for the extra land taken under the Railway Act, and claims that he is entitled to damages for injury done to his land outside of land paid for under the two awards. The defendants have paid into Court the sum of two hundred dollars, which they say is sufficient to satisfy the plaintiff's claim, if any, in the action, and the learned trial Judge has given judgment for three hundred dollars, inclusive of the sum so paid into Court.

The particulars of the damages are not set out in the statement of claim in such a way as to distinguish those for which the acts of the legislature would be a justification from the injuries claimed to have been done outside of the land expropriated. There is some evidence of such injuries, consisting partly of the overflow of the plaintiff's land with deposit of sediment, occasional pollution, or somewhat akin thereto, of a brook serviceable to the plaintiff for watering his cattle, and the deposit of stones on the plaintiff's land, and upon a road which would otherwise be passable and useful for communication between different portions of his farm. Besides these items of damage the plaintiff claims that his fences have been thrown down, but the greater part, if not the whole of his grievance consists in the removal of fences on the land taken for the purposes of the railway, and which would be covered by the awards. It is also claimed that the land was trespassed upon before the company has acquired any rights under the legislation under which it justifies its acts. It is easy to state these grievances in such a way as to make them appear very serious, but the defendants have exhibited photographs of the property, and the effect produced by these is to shew that the land over which the road passes cannot possibly have been of any considerable value; and I must confess that I have some compunctions, after a careful perusal of the evidence of damage, in allowing the amount to stand at the sum paid into Court. I did not, however, understand defendant's counsel to press for a reduction below the amount paid into Court, and it is to be said that such assessments must necessarily be more or less in the nature of guess work. It

will suffice to say that the sum of \$200 is the extreme limit of any damage of which there is reasonable evidence, and if this sum had been awarded I should not have felt disposed to disturb the judgment. That amount should certainly have been accepted by the plaintiff. The appeal should, therefore, be allowed with costs, and the defendants should have the costs of the trial.

TOWNSHEND, J., concurred with Russell, J.

Appeal allowed with costs.

TRESPASS—DAMAGES.

SASKATCHEWAN.]

[NEWLANDS, J

SMYTH V. CANADIAN PACIFIC R. W. Co.

(1 Sask. L.R. 165).

Trespass—Construction of Line of Railway—Removal of Gravel—Rights of Homesteaders on Dominion Lands—Damages.

The defendant constructed a line of railway across government land and opened a gravel pit thereon, from which large quantities of gravel were removed. The plaintiff made entry for the land as a homestead. In an action for trespass:—

Held, that a homesteader on Dominion lands has the exclusive right to the possession thereof, and may maintain an action for trespass.

The company endeavoured to justify its action under section 19, schedule A. of 44 Vict. ch. 1, which authorizes the company to take from adjacent public lands gravel for the construction of the railway. The evidence shewed that the gravel was used for maintenance of the right of way:—

Held, that statute referred to did not authorize the taking except for the purpose of construction which did not include maintenance of the right of way.

THIS was an action by the holder of a homestead entry for Dominion lands against the Canadian Pacific Railway Co. for trespassing on such land, and removing gravel therefrom. It was tried before NEWLANDS, J., at Moose Jaw.

C. E. Armstrong, for plaintiff.

W. B. Willoughby, for defendants.

June 27, 1908. NEWLANDS, J.:—This is an action for trespass by a homesteader against the Canadian Pacific R.W. Co. for taking and carrying away gravel from his homestead.

The facts may be briefly stated as follows:—

On the 22nd March, 1905, the defendant company surveyed a branch line across north-west quarter of section 4, township 16, range 13, west third meridian, to a gravel pit on property of their own. This line was afterwards located, the track laid and put in operation by the 24th July, 1905.

The plaintiff, on the 5th day of August, 1905, made a homestead entry for said north-west quarter of section 4, township 16, range 13, west third meridian. At that time he did not know that the defendant company's tracks were on his land, nor that they had opened a gravel pit on it. In the following spring he had the lines of his homestead surveyed, found that the company's tracks were across his land, and that they were taking gravel from a pit located partly on his and partly on their own land. On the 2nd of June, 1906, he sent the company the following letter:—

“June 2nd, '06.

“The Canadian Pacific Railway Company,

“Swift Current, Sask.

“Dear Sirs,

“Upon having the lines of my homestead, which is north-west quarter of section four, township sixteen, range thirteen, west of the third meridian, marked out, I find that your company has stationed its gravel pit upon it, and is now removing gravel from my land.

“No doubt this has been done inadvertently through an oversight, but naturally I do not wish to have gravel removed, and my homestead disfigured.

“This letter will therefore notify you to cease removing gravel from the above described property, and to remove your tracks and other paraphernalia, unless arrangements can be made with me.

“With regard to the damage which has already been done, and the gravel which has been removed, I will communicate with you later.

“Yours truly,

“W. Oswald Smyth.”

This notice was received by the company's station agent at Swift Current, and by him sent to the superintendent at Moose Jaw. The defendants took no notice of this letter, although they shortly afterwards, on the 13th of June, 1906, ceased taking gravel from the plaintiff's land until the following spring, when they commenced to take gravel again from plaintiff's land, and did not cease until this action was commenced, and they were stopped by injunction. The plaintiff in the meantime wrote the company on the 8th June, 1907, the following letter:—

“8th June, 1907.

“Messrs. the Canadian Pacific Railway Company,

“Swift Current, Sask.

“Dear Sirs,

“Last year I notified you to cease taking gravel from my land, which you are using as a gravel pit near Aikens. I am informed that you are at present taking gravel from this land at an enormous rate, and I again notify you to cease these operations until such time as a settlement has been made with me. For all gravel which has so far been taken I shall charge you at the rate of one dollar per car-load, and if any more is taken after the delivery of this letter I shall charge at the same rate, and shall consider your taking the gravel as an acquiescence on this price. This letter is not to be construed as giving you permission to take this gravel, but simply as a protection to me until such time as I can come to an agreement with your company, or until proper proceedings can be taken before the Courts to protect my interests.

“Yours truly,

“W. Oswald Smyth.”

This letter was also received by the company's agent at Swift Current and forwarded by him to the superintendent at Moose Jaw. No notice was taken of this letter either.

The company justify what they have done under several Acts of Parliament, and contend that if they took this gravel they were entitled to do so under those Acts.

The first Act referred to is sec. 19 of schedule A to 44 Vict. ch. 1.

which authorizes the company to take from adjacent public lands gravel, etc., for the construction of their railway. The evidence at the trial shewed that this gravel was being taken for the maintenance of their right of way. I do not think that any such construction can be put on the word "construction" as used in this section as to make it include maintenance.

The next statute referred to was sec. 14 of their contract attached to 44 Vict. ch. 1. This section gives them the right to lay out, construct, maintain, etc., branch lines, provided that before commencing they deposit certain plans. No evidence was given that this section had been complied with, so that I do not think they can justify under it.

They also referred to sec. 9 of the Railway Act, 42 Vict. ch. 9, but as this section also refers to the filing of certain plans, etc., which was not done so far as the evidence shewed, I do not see how it can help them.

The sections of the different railway Acts requiring notice to be given and the action to be brought within a certain time were also referred to, but were not pressed, as it was apparent from the evidence that the notice was given and the action brought within the time provided by these Acts.

The plaintiff's rights as a homesteader are set out in sec. 111, Dominion Lands Act, which reads as follows: "The entry for a homestead and for its attached pre-emption, if any, shall entitle the recipient to take, occupy, and cultivate the land entered for, and to hold possession of the same to the exclusion of any other person whomsoever, and to bring and maintain actions for trespass committed on the said land. the title to the land shall remain in the Crown until the issue of the patent therefor, and the land shall not be liable to be taken in execution before the issue of the patent." The plaintiff had, therefore, the exclusive right to this quarter section, and the defendants are trespassers since the time he gave them the first notice on the 2nd of June, 1906, and he is entitled to recover from them damages for the trespass committed.

Considerable evidence as to what damages should be given was put in. It was contended by plaintiff that he had sold a consider-

able quantity of gravel at 25 cents per cubic yard. I cannot allow damages on this basis, because I have no doubt that though a yard or a few hundred yards might be worth 25 cents each, it cannot be considered the value of the gravel in large quantities, and the local demand other than for railway purposes must be very limited. On the other hand, I do not think that the actual value of the land for farming purposes should be taken as the value. For the purposes of ballast it might be fairly put at one cent per yard, which is the highest value the defendants' witnesses put on it, and I will, therefore, allow the plaintiff \$590 damages.

Plaintiff also contends that three acres are useless to him on account of spur built across his land, and asks that defendants be required to remove same or pay him its value, three acres at \$30 per acre, namely, \$90. I think this is fair, and the order will be accordingly.

INFANT—ALLUREMENT.

QUEBEC.]

[SUPERIOR COURT.]

COLEY V. CANADIAN PACIFIC R.W. CO.

(Q.R. 29, S.C. 282.)

Liability for tort—Negligence—Allowing access of children to machinery.

Held, a railway company that leaves a mechanical contrivance (e.g., a turntable) in an open place to which children of tender years are allowed access, is guilty of negligence and liable for the consequences of their unskilful handling of it.

January 12, 1906. HUTCHINSON, J.:—The plaintiff alleges:—

(1) His marriage and the birth of his child, Florence E. Coley, on the 29th of August, 1895;

(2) That the defendant is a railway corporation possessing and operating a line of railway extending from the city of Montreal to and through the city of Sherbrooke, in the district of St. Francis;

(3) That in connection with this railway, the company had a turntable in its yard at the city of Sherbrooke;

(4) That on the 14th day of May, 1905, between the hours of seven and eight in the evening the plaintiff's child above named, Florence E. Coley, while playing with other children around and upon the said turntable of the company defendant, with the knowledge and consent and at the invitation of the company and its employees, but without the knowledge of the plaintiff, was seriously injured;

(5) That the turntable, at the time above mentioned, was not locked or fastened, or guarded in any way to prevent children from moving or turning it, and the plaintiff's child had her foot caught between one of the rails on the approach to it and the beam on it, while it was being turned by one of the other children, and so badly crushed that it was necessary to perform three operations upon her foot, and finally to remove the same from the ankle;

(6) That it was a common practice for children to play upon the turntable, which was not kept fastened, and they were allowed to so play upon the same with the full knowledge and consent, and at the invitation of the company and its employees;

(7) That the injury to the child was wholly due to the act, fault, negligence and carelessness of the company defendant and its employees;

(8) That by reason of the said accident, the plaintiff, the father of the child, had suffered damage and has been put to expense, for hospital expenses, doctors' fees, nurses, drugs, medicines and car fares amounting to the sum of \$109.05;

(9) That by reason of the said accident it will be necessary for the plaintiff to supply the said child with an artificial foot at a cost of at least \$50;

(10) That by reason of the accident the plaintiff has suffered damage in the sum of \$159.05, which he is entitled to demand and collect from the company defendant.

The defendant by its plea denies the allegations contained in the plaintiff's declaration, and further alleges: That if the said

Florence E. Coley was injured on the 14th day of May, 1905, the injuries were the direct result of the negligence, fault and carelessness of her, Florence E. Coley, and of the plaintiff, E. Coley.

That whenever children have been noticed near the turntable, and elsewhere upon the defendants' property, playing, they have been warned against so playing, and have been forbidden to go upon the defendants' property.

That the said Florence E. Coley, and the other children referred to in the plaintiff's declaration, if they were playing around and on the said turntable of the company defendant, were trespassing upon the said property illegally, and in direct contravention of the law, and without the consent of the defendant, the turntable at the time being in the usual and proper condition in which it is ordinarily kept.

It is in evidence that the turntable was not enclosed, and although it was on the defendant's property, yet many persons pass across the defendant's railway tracks and yards in the immediate vicinity, of the turntable, and particularly the employees of the Canadian Rand Drill Co., in going to and from their work, and that in the summer time, children were continually in the company's yards immediately surrounding the turntable, and that the witness, Ernest Miron, a boy of 14 years of age, states that he had taken a ride on the turntable some time before the accident in question. Further the turntable was not fastened, although there was a means of fastening it, which the defendants had at one time or occasionally used.

It appears also that the boy, Gilbert Sykes, 15 years of age, had visited the turntable on the same Sunday afternoon, the 14th day of May, 1905, and had been allowed to take a ride on it, someone, but apparently not in the employ of the company defendant, having invited him there, and turned the turntable in order to give him a ride.

Then this boy, Sykes, after this experience, took his younger brother, and the plaintiff's child, 10 years of age, and another, a younger child of the plaintiff, to the turntable, and, having placed the two children of the plaintiff on the turntable, he and

his brother, by means of projecting arms, turned it, and the child, Florence E. Coley, having become somewhat alarmed, requested the boy Sykes to stop the turntable, but before he had succeeded in doing so, the said child, Florence E. Coley, attempted to step off the turntable and her foot was caught between the iron rail leading to the turntable and a beam that formed part of or supported the floor of the turntable, and her foot was badly crushed, necessitating amputation.

This turntable was evidently an allurement to children, and children were frequently in the yards in the immediate vicinity of the turntable, although often driven away by the defendant's employees who had instructions to keep them away.

In this connection it must be borne in mind that the degree of caution required in a child is to be measured by its maturity and capacity, and the rule in reference to the negligence of an adult and children is quite different. The adult is bound to exercise such care and caution as is ordinarily exercised by persons of ordinary intelligence and discretion under similar circumstances, but the degree of care to be exercised by a child is made to depend upon its age and knowledge.

As a case in point see the case of *Merritt v. Hepenstal*, 25 S.C.R. 150, where it is held by the Supreme Court, "that the doctrine of contributory negligence does not apply to a child of tender age." See also *Beauchamp v. Cloran*, 11 L.C.J. 287, in which it was held: "That a person is liable in damages for the slightest negligence in respect to a child of tender years, the want of capacity in the latter rendering extreme care and watchfulness necessary." In the Ontario case of *Ricketts v. Markdale*, 31 O.R., p. 623, the following statement of law from the American Encyclopædia of Law, (2 ed.), vol. 7, p. 408, was approved by the Ontario Divisional Court of Appeal, viz.: "Nor will a child negligently injured by a railroad, or by defects in the highway, or by a dangerous machine, or by an explosive, in any way be charged with contributory negligence, if, at the time of the said injury, he is doing what he would have been expected to do

by an ordinary careful and prudent child of the same age making due allowance for the natural instincts of children."

Laurent, in discussing this question of negligence, states a case at page 411, vol. 20, to this effect: "A railway crosses some fields designed for the pasturing of cattle; numerous animals pass there, and remain there night and day without guardians. A cow one day lay down on the rails, and occasioned a derailment; the result was an accident, and an action for damages was taken against the company; and another action by the company against the proprietor of the cow. There was no law requiring the railway to fence its tracks on each side. The Court, however, decided that the proprietor of the cow was not responsible, because there was no fault attributable to him, and the Court condemned the company to pay damages because the accident was attributable to its negligence in not having established a fence which would have prevented the accident. It was in vain that the company objected that there was no law which obliged them to fence the railway. The Court answered that in creating a dangerous establishment it obliged itself to take measures of prudence which alone would prevent accidents; there was then an obligation on the part of the railway company to watch over the public security, which the operating of the road necessitated."

In the case of *Clarke v. Chambers*, 3 Q.B.D. 339, Chief Justice Cockburn in giving judgment said: "That a person is guilty of negligence who leaves unattended and unguarded in a street or public place to which children are in the habit of resorting, or along which they have to pass, a dangerous machine, or a machine which may prove dangerous by being meddled with or interfered with by them."

And in the case of *Lynch v. Nurdin*, 1 Q.B. 29, Lord Denman observed: "I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of the third party, and, if that injury should so be brought about the sufferer may have redress against both, or either of the two, but unquestionably against the first."

Although there have been expressions of individual Judges not being fully in accord with the decision in this case, it has never been overruled, and in the English text-books is quoted as being law.

Negligence no doubt must be proved in the defendant, although injury has resulted to a child incapable of negligence, yet in view of the above mentioned facts, and the application of the law to them, as shewn in the cases above mentioned, the conclusion is unavoidable that the company defendant was guilty of negligence.

The conclusion is that the plaintiff is entitled to claim and to be paid the sum of \$159.05 as the direct pecuniary loss he has suffered, and will suffer, by reason of the said injury to his said child.

Doth condemn the defendant to pay the plaintiff the said sum of \$159.05, with interest from this date and costs of the suit.

Brown & Macdonald, for plaintiff.

Cate, Wells & White, for defendants.

See next case.

QUEBEC.]

[KING'S BENCH.

CANADIAN PACIFIC R.W. CO. v. COLEY.

(Q.R. 16 K.B. 404.)

Liability for tort—Negligence—Allowing children access to machinery.

Held, a railway company, that leaves a mechanical contrivance (e.g., a turntable) in an open place to which children of tender years are allowed access, is guilty of negligence and liable for the consequence of their unskilful handling of it.

THE judgment of the Court (Taschereau, C.J., Bossé, Blanchet, Trenholme and Cross, JJ.) was delivered by

April 23, 1907. TRENHOLME, J.:—In this case, we adopt the views of the first Court and find no error in the conclusions at which it arrived.

There is an interesting question involved in the case which is dealt with in the judgment of the Superior Court—an interesting question as to how far a railway company is responsible for injuries received by a child, say of nine or ten years of age, when playing upon its turntable on its own property. The railway company at Sherbrooke in its own yard has a turntable, and the child of the respondent in this case with some other children was playing upon that turntable and getting a ride when the accident occurred which resulted in the loss of the child's foot. The question before us is this: Is the railway company responsible for an accident of this kind when children come on the railway company's property and get hurt? Well, the judgment holds that under the circumstances of this case the railway company is responsible on the principle that if anybody employs a dangerous instrument or thing, even on his own property, which he knows or has reason to believe in its allurement to children coming about it is dangerous and likely to hurt them, then he increases his responsibility if he does not make that machine so that the children will not get hurt. In this case the turntable was not fastened, and the company had good reason to know that it was dangerous, because other children had been hurt playing about.

We simply confirm the judgment for the reasons stated in the judgment of the first Court without any further discussion.

Cate, Wells & White, for the appellants.

Brown & MacDonald, for the respondent.

INFANT—NEGLIGENCE.

NOVA SCOTIA.]

[SUPREME COURT.

LOTT V. SYDNEY & GLACE BAY R.W. CO.

(41 N.S.R. 153).

BEFORE SIR R. L. WEATHERBE, C.J., TOWNSHEND, J., GRAHAM, E.J.
AND RUSSELL, J.*Negligence—Electric Tram Company—Injury to infant—Failure of motor-
man to take proper precautions—Evidence.*

In an action brought in the name of an infant, claiming damages for injuries occasioned through the alleged negligence of the defendant company in the operation of their electric tramway, the evidence shewed that the infant, a child aged one year and eleven months, was seen approaching the track upon which one of the defendant's cars was moving slowly. The whistle was sounded and the child stopped for a moment and then moved quickly towards the car and was struck, and received the injuries for which the action was brought. Upon seeing the child stop when the whistle was blown, the motorman immediately applied speed without waiting to see whether the child was going to retreat or making any effort to remove it from its dangerous position.

Held, that this was a clear case of reckless conduct, for which defendant was responsible.

Also, that the failure to take proper precautions to avert injury to the child was not to be excused by the alleged necessity of complying with the time table and preventing delay to passengers.

Also, that the failure of defendant company to provide its car with a fender was clear evidence of negligence.

APPEAL from the following judgment of Meagher, J.

This is an action by Theresa Lott, an infant, for injuries occasioned to her through the alleged negligence of the defendants in the operation of their electric tramway in the town of Glace Bay, and also by her father for moneys expended for medical aid, nursing, etc., for her; he also claims damages for loss of her future services. The later was abandoned on the trial.

I do not attach any importance to the averment that the defendant had no permit from or license from the town council of Glace Bay to operate their road. It is of no moment in the light of the evidence and the statute. The complaint that the car or its brakes were out of order was unfounded.

It was claimed at the trial that the car was not at the time operated by a skilled motorman; that Doucette, who was at the power handle, was inexperienced, and that the accident was due to his inefficiency. There is no further averment of that kind in the pleadings, and I do not think that the general averment of negligence covers that aspect: *Manzorie v. Douglas* (1880), 6 Q.B.D., at 145-6. I shall assume, however, for the present that it is sufficiently alleged. Doucette was quite capable of efficiently discharging the duties of motorman; apart from that, Old was near enough to him to render timely and efficient aid, and did co-operate with Doucette in executing the movements required to stop the car. Whether these movements were begun soon enough is, however, a matter for consideration when discussing the evidence. Meantime, I may add that Doucette's alleged inefficiency had nothing to do with causing or contributing to the accident, even assuming his incompetency.

The infant, at the time of the accident, was one year and eleven months old. She was alone at the time on the public street in a somewhat thickly populated part of the town; and, so far as shewn, no one was near enough to afford her assistance, excepting, perhaps, Donald Morrison, who was on the sidewalk opposite to the direction she came from.

The defence of contributory negligence was pleaded both as to herself and her father.

It is obvious she had not sufficient capacity to be sensible of danger from the car nor the power to avoid it.

The weight of authority is opposed to the contention that the negligence of those in charge of the house where she lived, including even that of her father, can be effectively urged against her right of recovery.

This view, and that already expressed as her inability to appreciate or avoid danger, relieves me from the necessity of further considering the question of contributory negligence.

In the case of an infant injured by an accident through negligence, while in a place where it was dangerous to be, and where the infant would not have been if properly cared for—I am

speaking of one of tender years unable to care for itself—there are in the chain of causation two negligent parties: the one whose negligence caused the injury, and the other whose care should have protected the child from straying into a place of danger; and why the negligence of the latter, be it even that of a parent, should be held to excuse the negligence of the other, when it is the child who suffers, seems difficult to understand. I am, of course, not referring to a class of cases where the element of contract existed, as in *Waite v. The North Railway Company*, E. B. & E. 719.

The position just stated seems to me to come within the first of the eight propositions stated by Lord Esher, M.R., in *The Bernina*, whose judgment was expressly affirmed by Lord Herschell in the same case, 13 A.C., at page 7.

It remains, however, to consider whether the defendants were negligent in any sense so as to render them liable.

The motorman Old, who was in charge of the car, was called as a witness for the plaintiff, and no one could have given his testimony more fairly, nor with a more earnest desire to state the facts as he remembered them, accurately and without any attempt to colour or minimize them.

The street was fairly straight for several hundred feet from the place of the accident back in the direction in which the car came. The plaintiff's house is on the eastern side of the street, while the defendants' track is close to the gutter on the opposite side, being only about one foot and a half therefrom. The accident happened almost directly opposite her home, and at that point the distance between the street line and the defendants' nearest rail is 22 feet, and between the plank sidewalks on each side of the street is, as near as may be, 30 to 32 feet.

She left home, crossed the sidewalk, the intervening space of 22 feet and had crossed the nearest rail, or was in the act of doing so, when she was struck. The latter is, I think, the more correct view. The wheel did not entirely cross her leg, the latter being under the forward part of it.

Mrs. Mason, who saw the accident from her house, said, as

nearly as she could tell, the car went two or three feet after it struck her.

Old, the motorman, said as the car approached the plaintiff's house he saw a long express waggon standing across the street, almost opposite to it, the rear end of which was so close to the track as not to leave room for the car to pass. It was on the same side as the plaintiff's house. The car was slowed down several feet from the waggon, but it still had headway on. Some one moved the waggon out of the way and then the car was given the least possible increase of speed. He watched the car while passing the waggon. Just after the team was removed out of way he saw the child on the same side of the street, close to the gutter; she appeared to him to be loitering there; not going in any direction. Up to this time he was standing in the doorway of the car, partly in the car and partly in the door, but as soon as he saw the child he went up beside Doucette at the power handle. The car was still going gently. Then he saw her run out part of the way on the street toward the track and stop. The car whistle was blown. When she stopped she appeared to him as if about to turn back to the side of the street she came from, and partly turned around, as the witness thought, to go back in that direction. The car was still moving along as slowly as possible when, without any warning, she turned again and ran rapidly across in front of the car. The emergency air brake was applied as promptly as possible and reversed so as to give full power backwards. The car was just coming to a standstill when it struck her. She was four or five feet from the nearest rail when she turned and ran in front of the car. Her movements in turning the last time and running in front of the car were very quick.

On cross-examination, he said there was absolutely no danger when he first saw her; the first time she started to cross he shut off the power, but gave a slight increase before she started to cross the second time. What I understand from this is that it was after she stopped and turned, with the apparent intention

of returning to the side of the street she first came from, that he gave that increase, and before she finally turned to cross in front of the car.

(After quoting further from the evidence, the learned Judge continued) :—

From the foregoing it is clear the rate of speed was very moderate all the way from Ingraham's store, and that the car was therefore under control; that apart from one aspect which I shall presently take up there was no negligence on the part of the motorman. He was vigilant and alert throughout and acted promptly, and was not guilty of any negligence or recklessness, unless his failure to bring the car to a standstill earlier, or to jump off and rescue the child from the street, can be so regarded. The motorman was, of course, bound to use due care, but what is due care depends on the circumstances of each case. Having regard to the age and size of the child, he was, of course, bound to adopt greater care against accident and injury to her than if she was of an age capable of appreciating danger and taking care of herself.

The defendants carry a large number of passengers between the several towns and villages along the route of their line, and connect with, and pass through, several places where there is a pretty large population. They run, no doubt, on a time schedule, and much inconvenience and loss of time to those travelling by their cars, as well as loss to the company itself, would follow a failure to keep up their time schedule at the various points on their line. The cars, no doubt, often meet with obstruction, producing delay, from teams and other causes, interfering more or less with the regularity in point of time of their runs, and if the extreme limit of care insisted on for plaintiffs is to be exercised, namely: that the motorman must stop every time a young child, or a wayward one, approaches at all near the track, and must remain at a standstill until the removal of the child to a place of absolute safety, either through its own volition, or through the agency of a third party, or must leave his place in the car and remove the child himself, and meantime, keep the passengers on

the car awaiting the execution of these movements before he proceeds on the trip; if, I say this degree of care is to be exacted at the risk of being held liable for negligence if it is omitted, then burdens are placed on the electric lines which cannot fail to lessen their usefulness, interfering considerably with the promptness, speed and accuracy of the connection of their cars with other points on the line, and at the same time render travel uncertain, especially in and about places like Glace Bay, and the other mining towns and villages in the vicinity, through and near which the defendants' line is operated. In these places, there are many children of all ages and conditions, some of whom have custodians who look after their safety, but many of whom have little or no care bestowed upon them and are left to come and go, and remain where they list, without restriction or protection; many of them use the streets as playgrounds. These conditions would render the operation of the defendants' road burdensome and slow, if the degree of care claimed for is required to be observed in every instance. If this was a case of injury done by a private carriage there would be much greater force and point to the contention (adverted to), as to the course the driver should pursue towards a child such as this and under the circumstances in proof.

On the question of stopping, the case of *Singleton v. The Eastern County Ry.* (1859), 7 C.B.N.S. 288, is in point. There the driver of the train saw the child on the railway in an obviously dangerous position; he blew the whistle, but made no attempt to stop the engine. One of the children, 3½ years old, had its leg cut off by the engine. It was held there was no evidence of negligence to go to the jury. The only difference between that case and this consists in the fact that there the child was wrongfully on the railway; and while perhaps that cannot be said here absolutely, yet much the same element is present, namely, the fact that the child wrongfully put herself in the way of the car, which, while in motion, has, in a sense, the exclusive right to the track as it progresses onward. See section 4 of chapter 160, Acts

of 1902. I cite that case, however, only as to the question of the absolute duty to stop the car.

Williams v. The Great Western Railway Co. (1874), L.R. 9 Ex. 155, is in its facts much the same as the one above mentioned; but there the child was found in an unfenced public foot-path, which crossed the railway on the level. The defendants were, by statute, required to erect a gate or stile at their intersections, and the Court held that the neglect to fence constituted evidence of negligence to go to the jury, and that the fence might have prevented the accident.

There is still another ground for determination. By rule 6, of the schedule to the chapter above cited, it is provided that the car shall be provided with a fender of such design as the said municipal council and the town councils of the respective towns within their jurisdiction shall approve.

The car had no fender. While some correspondence was had between the company and the town of Glace Bay on the subject, I have not been informed what it was, nor do I know whether any, or all, or none of the councils referred to in rule 6, have approved of a fender design.

If one has been approved of, it is clear the defendants would be guilty of a breach of statutory duty if they did not use it; and that in itself would, as in the case last mentioned, be evidence of negligence. The evidence there was, of course, stronger and more direct than in the present case. The fence might have, or probably would have, diverted the child's attention and prevented its getting on the line. Here, the fender could not have prevented the collision, though its presence might have lessened the extent of the injury. I do not know anything about how they operate; nor whether one which would meet the requirements of rule 6, in the matter of approval of the respective councils, would be in any measure an efficient protection against injury. For aught I know, it might have been, relatively to the height of the child and the centre of gravity, so far from the ground as to strike her at a point which would throw her down on the track instead of on the fender. All this is the merest

speculation. The defendants could not use one until it was so approved; and there is room for doubt whether the initiative, in securing the approval, was not cast upon the various councils instead of on the defendants. Of one thing I am convinced, it would have no effect in preventing collision between the child and the car. At most, it could only have reduced the gravity of the injury, and even that is altogether problematical in the state of the record as to the evidence.

Upon the whole case, I feel myself constrained to find the law and the facts for the defendants. Reasonable care in the circumstances was used. It was such an accident as reasonable care, in the light of the situation, could not have prevented. I have given the case much anxious consideration, and am comforted by the reflection that it is a case which, upon appeal, will be as open to the Appellate Court to deal freely with as it was to myself. There is substantially, upon the main features, no conflict of evidence.

No evidence was given to shew the construction of the vestibule of the car, whether it was an entirely closed in apartment or not. If I am entitled to resort to my general every day knowledge as a juror, I should say it was; and that being so, I don't think either the motorman or his assistant, no matter how active either may have been, could have opened the door leading out on the street and got to the child and removed her out of danger, in the interval, after she turned the last time to go towards the track, and before she was struck; that step would, therefore, not have prevented the accident, and I am unable to conclude that the failure to come to a dead stop before she made the last turn just mentioned, was, under the circumstances, such negligence as to require me to hold, either in fact or law, that the defendants are liable.

P.S.—I take the liberty of referring to what Lord Blackburn said in *Stoomvaart v. Peninsular and Oriental Steam Navigation Co.* (1880), 5 A.C. at page 891:—

“That a man may not do the right thing, nay, may even do the wrong thing, and yet not be guilty of neglect of his duty, which is not absolutely to do right at all events, but only to take

reasonable care and use reasonable skill, and I agree, that when a man is suddenly, and without warning, thrown into a critical position, due allowance should be made for this, but not too much."

November 26, 1906. *W. B. A. Ritchie, K.C., and T. R. Robertson*, in support of appeal:—There was negligence on the part of the motorman in not stopping the car. The motorman must exercise more watchfulness where he observes, or has reason to expect, that children are playing near the track. He should have the car so under control as to avoid injuring them by collision: *Joyce on Electric Law*, sec. 582; *Woekner v. Erie Electric Motor Co.*, 176 Penn. St. 451; *Bergen County Tract Co. v. Heitman*, 61 N.J.L. 684. The fact of negligence of the parent in permitting the child to be on the street, without someone in charge, is no answer to an action by the child. Contributory negligence cannot be imputed to a child of tender years: *Turner v. Isnor*, 25 N.S.R. 428. There is no distinction between the driver of a public vehicle and that of a private one: *Beven*, p. 146, *et seq.*; *Haight v. Hamilton St. Ry. Co.*, 29 O.R. 279. The defendants' car should have had a fender, as required by the statute: *Williams v. G. W. Ry. Co.*, L.R. 9 Exch. 197, and is bound to have a fender, even if the statute did not require that it should: *Groves v. Wimborne* (1898), 2 Q.B. 402.

H. Mellish, K.C., contra:—The finding of a trial Judge on a question of fact will not be disturbed: *Stuart v. Mott*, 33 S.C.R. 384; *Merritt v. Hepenstal*, 25 S.C.R. 150, at p. 172. The child should not have been on the street without supervision. The father is not entitled to recover, even if the child is: *Mulligan v. Curtis*, 100 Mass. 512. The party who gets a verdict of a trial Judge should be in as good a position as the party who gets a verdict of a jury: *Village of Granby v. Mainard*, 31 S.C.R. 14, p. 21. The tramway has a right on the street, whereas an unattended child has no right there: *Beach on Negligence*, p. 150; *Morrissey v. Eastern Ry. Co.*, 126 Mass. p. 377. Assuming the

absence of a fender to be negligence, the plaintiffs must shew that it was the absence of the fender which caused the accident. There is no evidence that that section which requires us to have a certificate has not been complied with; nor was it one of the causes of complaint, that the company had no right to be running the cars.

W. B. A. Ritchie, K.C., in reply:—The Court has power to change the verdict of the learned trial Judge: *Copeland v. Sutherland* (1898), 1 Ch. 174; *The "Gairloch"* (1899), 2 Irish R. p. 1. The learned trial Judge himself said that he had much comfort in the reflection that this was a case which, upon appeal, would be as open to the Appellate Court to deal freely with, as it was to himself: *Dempster v. Lewis et al.*, 33 S.C.R. 292; *Regina v. Chesley*, 16 S.C.R. 306, at p. 313; *Spindler v. Farquhar*, 38 N.S.R. 199. The learned Judge has made an error of law. He has put the degree of duty imposed on the defendants too low. The case of *Singleton v. Eastern County Ry. Co.* (1859), 7 C.B.N.S. 288, is not good law to-day. The case of *Mangan v. Atterton*, L.R. 1 Ex. 239, would not be followed since the ruling in *Clarke v. Chambers*, 3 Q.B.D., p. 338. Pollock on Torts, 6th ed., pp. 456-7; Sherman and Redfield on Negligence, 5th ed., sec. 483, note. The case of *Sievert v. Brookfield*, 35 S.C.R. 508, applies exactly to this case. The statute requires the defendants to have fenders on their cars, and it was their duty to submit a design to the council for approval: *Williams v. G. W. Ry. Co.*, L.R. 9 Exch. 155; *Wanless v. North Eastern Ry. Co.*, L.R. 6 Q.B. 487; *The Pennsylvania*, 19 Wallace 125, at p. 135; Annual Digest, p. 213. The father is entitled to damages: *Clarke v. London Omnibus Co.*, 92 L.T. 691. No negligence can be imputed to the father: Sherman and Redfield, secs. 71 and 72. The doctrine of imputed negligence is not in existence in English law to-day: Beven, pp. 192-204; Sherman and Redfield, sec. 66. They had no right to be running cars. All the council did was to give the permission to run for one year, and that year had expired.

January 12, 1907. **SIR R. L. WEATHERBE, C.J.**:—This is an action for negligence in so operating defendants' car as to have caused the loss of the leg of a child one year and eleven months old.

It is contended that upon the evidence of defendants' servants, they are liable.

It must, at least, be admitted that the child was seen approaching the car soon enough to have slowed down sufficiently to have prevented the accident.

In that respect alone, it was argued, there was disclosed, in the want of due care, ground to render defendant liable.

But plaintiff's contention does not stop here. Liability is put, it is said, beyond doubt, inasmuch as, when it became clear that the child, almost close to the track, after the car had been slowed, was practically safe, merely because it appeared to have turned its head, without moving from its tracks, the motorman, to save time, ran the risk of putting on speed, which caused the damage.

When the child was seen approaching the track, at a speed which clearly would have caused collision, instead of coming to a stop, the car no doubt was only slowed when the whistle was sounded.

The child stopped. It must have been clear that the sounding of a whistle could not have availed in the least degree to warn a child of tender years, as it certainly would an adult. It might have had the opposite, if any, effect.

In point of fact, at the very instant the child's head was turned, without even waiting a minute to see what it would do, speed was applied. At that very instant, also, the child hastened across the track and had its leg crushed by the wheel of the car.

The question, therefore, is, whether the urgency of the business of the company was so great, in making speed, that a few seconds of time should not have been afforded at this critical juncture, which it is not denied, was obvious.

A motorman of experience—indeed, a person without experience, must have seen—and this is not denied—that if the child should not either remain still or retreat, but hasten for-

ward—collision would have followed. Evidently the motorman and his companion, who was in training, both saw this. But the excuse offered for putting on speed was that it was supposed the child indicated by the turning of its head that it was about to turn round and retreat, as one who had reached years of discretion might have done.

But, even in the case of an adult, one might have supposed that less than a minute of time might have been accorded, to be sure that it was safe to proceed.

It is contended that it was glaringly apparent, from the time the child was seen, to the most ordinary intelligence, that it would be impossible by any means available, to warn a mere infant—that fact would have flashed instantly upon the mind of a car driver with the slightest training, that if it were possible for the child, when first observed, to reach the track before the car could have been propelled safely past that point, speeding the car would have endangered its life, because it was a mere matter of impulse at what instant it would have made its utmost effort to reach the danger point.

In such a case, the only safe course, perhaps, would have been to have removed the approaching child from the track, just as it would have been necessary to have removed a drunken man, or a horse and carriage without a driver.

That, however, possibly imposes greater restriction against the defendant than is necessary to bring them within the conditions of this case.

Here, the child had almost reached the track. It certainly was just as likely to proceed as to return. At any rate, there clearly was uncertainty as to whether it would retreat. No one could count on the impulse which might move the infant. No one ever does. Here were grown men, who may reasonably be supposed to be familiar with every obstruction that could be presented to impede the cars, especially the obstruction by obtruding infants.

The learned trial Judge, describing the villages on the route of the track under discussion says:—

"In all these places there are many children of all ages and conditions, some of whom have custodians who look after their safety, but many of whom have little or no care bestowed upon them, and are left to come and go and remain where they list, without restriction or protection. Many of them use the streets as playgrounds."

If, instead of this infant, there had been a wandering unattended team, with a truck, slowly nearing the track, in front, heavy enough to endanger the cars and passengers, would the motorman consider it prudent, because he supposed it possible the team might turn, to increase the speed?

The obstruction of the child did not endanger the lives of the passengers, including the drivers, or the property of the company. All that was endangered was its own life and limbs.

In the judgment appealed from, there seems to be little difficulty in reconciling the facts. This case is free from contradictory evidence. What is challenged by appellant is the principle on which the decision proceeds.

One thing must be said for that judgment, viz.: that the facts could not be construed to reach any other decision than the learned trial Judge found, considering the view he has taken of the responsibility of the defendant company; and, inasmuch as he has expressed doubts, I feel less reluctant in being obliged to differ from the decision, as I do, with much deference.

Considerations as to the "disarrangement of the time schedule," "inconvenience of passengers," "loss of business to the company," everything of a business nature, sinks, I think, into insignificance in contrast with the sacred regard in which human life, especially of helpless children, is to be held under the law.

The following is from the decision appealed from:—

"The cars, no doubt, often meet with obstruction, producing delay, from teams and other causes, interfering more or less with the regularity in point of time of their runs, and if the extreme limit of care insisted upon for plaintiff is to be exercised, namely: that the motorman must stop every time a young child, or a way-

ward one, approaches at all near the track, and must remain at a standstill until the removal of the child to a place of absolute safety, either through its own volition, or through the agency of a third party, or must leave his place in the car and remove the child himself, and, meantime, keep the passengers on the car awaiting the execution of these movements, before he proceeds on the trip; if, I say, this degree of care is to be exacted at the risk of being held liable for negligence if it is omitted, then burdens are placed on the electric lines which cannot fail to lessen their usefulness, interfering considerably with the promptness, speed and accuracy of the connection of their cars with other points on the line, and at the same time render travel uncertain, especially in and about places like Glace Bay, and the other mining towns and villages in the vicinity, through or near which defendants' line is operated.

“These conditions would render the operation of the defendants' road burdensome and slow, if the degree of care claimed for is required to be observed in every instance. If this was a case of injury done by a private carriage, there would be much greater force and point to the contention (adverted to), as to the course the driver should pursue towards a child such as this, and under the circumstances in proof.”

It is, I think, upon reasoning altogether different from the above, that those responsible for the running of trams must be guided to save themselves from damage. And I feel sure that human life would be in much greater jeopardy, than under the law it should be, and is intended to be held, if a decision resting upon the reasons supporting this one were sustained. I must entirely dissent from the suggestions contained in what I have quoted.

No doubt, if the grounds for the refusal to sustain plaintiff's claim, which were questioned on the argument, are to prevail, defendant may escape, but I think where it is clear, as it is on the evidence in this case, that the driver refused to wait an instant to observe whether the infant, facing towards and close

to what was likely to be its destruction, would really retreat, and instantly increased the speed, which caused the damage to the child, which merely pursued the course it had been and was likely to follow, no clearer case of carelessness and reckless conduct could happen.

And the only excuse that can be offered, emphasizes the weakness of the defence, namely, the urgency of complying with the time table and preventing the delay of passengers.

With regard to the absence of a fender, *Williams v. The G. W. Ry. Co.* (1874), L.R. 9 Ex. 155, is applicable. The child was found in an unfenced public foot path, which crossed the railway on the level. Defendants were by statute, required to erect a gate, or stile, at their intersections, and the Court held that the neglect to fence was evidence of negligence, and that the fence might have prevented the accident. This case is cited in the decision at the trial, but the learned Judge seems to doubt whether it was obligatory on the defendant to apply for the approval of fenders and attach them to their cars. I think the law required them to do so, and have no doubt the absence of the fender was clearly evidence of negligence.

I am of the opinion that the appeal should be allowed and plaintiff should recover, and that the damages should be assessed by referring the case for this purpose to the learned trial Judge.

GRAHAM, E.J., and RUSSELL, J., concurred.

TOWNSHEND, J.:—I agree with the decision of the learned Judge below, and think the appeal should be dismissed.

Appeal allowed.

NOTE.

See *Farrell v. Grand Trunk Ry. Co.*, 2 Can. Ry. Cas. 249; *Tabb v. Grand Trunk R.W. Co.* and *Potvin v. Canadian Pacific R.W. Co.*, 4 Can. Ry. Cas. 1 and 8; *Newell v. Canadian Pacific R.W. Co.*, 5 Can. Ry. Cas. 372; Beven on Negligence in Law (3rd ed.) (1908), pp. 160-176.

INFANT—NEGLIGENCE—RIGHT TO SUE.

ALBERTA.]

[STUART, J.

TOLL V. CANADIAN PACIFIC R.W. Co.

(1 *Alta. L.R.* 244.)

Pleading—"Not guilty by statute"—Railway law—Specific denial of representative capacity of plaintiff—English M. R. 238—Trial by jury—Necessity of amendment at trial.

The plea of "not guilty by statute" is not a specific denial of the representative character of the plaintiff alleged in the statement of claim. Where, therefore, a plaintiff, as administratrix of her deceased husband, sued a railway company for damages for causing his death by negligence, and the company pleaded "not guilty by statute," but did not specifically deny the representative character of the plaintiff, *Held*, that, although the evidence shewed that the plaintiff was an infant at the time letters of administration were granted, this fact was no answer to a motion for judgment on the verdict of the jury in favour of the plaintiff, no amendment having been asked for at the trial, and the case having been left to the jury on the pleadings as they stood.

T. was a locomotive engineer in the employ of the defendant company. While in charge of a locomotive in motion, he looked out one of the cab windows and was instantly killed. Plaintiff was his widow, and was granted letters of administration of his estate.

Defendant traversed the statement of claim, and pleaded "not guilty by statute." On the examination of the plaintiff for discovery before trial it was brought out that she was an infant.

At the trial before Stuart, J., with a jury, on November 8th, 1907, at Medicine Hat, the plaintiff admitted that she was under age when letters of administration were granted to her.

At the close of the evidence, counsel for the defendant moved that plaintiff's action be dismissed, on account of plaintiff's own admission of infancy urging that the letters of administration were consequently invalid.

The trial Judge said he would reserve the question and let the jury find on the facts, and assess the damages, if any.

No amendment of the evidence was asked at the trial, and counsel for defendant contended that the plea of "not guilty by

statute'' was sufficiently broad to include the proof of infancy as fatal to plaintiff's action, which was required to be brought by the administrator of the deceased. It was also contended that it was not necessary to amend the defence, but that the Court should take judicial notice of the invalidity of the letters of administration.

The jury having found a verdict for the plaintiff for \$4,500, Stuart, J., stated that he would hear further argument by counsel on motion for judgment at Calgary.

Walsh, K.C., and White, for plaintiff.

Bennett, K.C., and H. A. Allison, for defendant.

April 23, 1908. STUART, J.:—Motion by plaintiff for judgment upon the verdict of a jury rendered at the trial at Medicine Hat on November 8th, 1907.

It seems to me that the exact point reserved was to some extent overlooked on the argument. It was forgotten that there was a trial by a jury and that the issues of fact to be tried were sent to the jury for a verdict upon them. What were the issues upon the record? Certainly as the record stood the question whether or not the plaintiff was or was not the administratrix of the deceased was not in issue. This was admitted on the argument on the motion for judgment, though it was questioned by defendant's counsel at the trial. That question would, beyond doubt, be an issue of fact upon which the jury ought to return a verdict, although, of course, a grave matter of law was also involved upon which I should have had to give the jury direction. The statement of defence does not deny specifically the allegation contained in paragraph 1 of the claim, viz., that the plaintiff is the administratrix of the deceased. It is true that the plea of "not guilty by statute" is on the record, but it is clear, I think, from the authorities, that this does not operate as a denial of the representative capacity of the plaintiff alleged on the statement of claim. For instance, in an action for seducing the plaintiff's servant the plea "not guilty" does

not deny the relationship of master and servant: *Torrence v. Gibbins* (1844), D. & M. 226, 52 B. 297, 13 L.J.Q.B. 36, 7 Jur. 1158, and in an action of crim. con. the plea does not put in issue the marriage: *Chantler v. Lindsey* (1846), 4 D. & L. 339, 16 M. & W. 82, 16 L.J. Ex. 16, and in an action of slander of the plaintiff in his office or profession, the plea does not put in issue the fact of the plaintiff holding the office: Chitty's Precedents-Pleading (2nd ed.) (1847), pp. 639-653. Besides, English Marginal Rule 238, is in force here and directly provides that the representative capacity of the plaintiff must be specifically denied.

Upon the record, therefore, as the case went to the jury, the representative capacity of the plaintiff, that is, the fact that she was the administratrix of the deceased, was admitted. Upon that point there was no issue for the jury to try. The defendant, it is true, moved for a nonsuit at the close of the plaintiff's case, but that could only be upon the issues as they went to the jury at the opening of the trial, of which the question of administration was not one. The plaintiff did not need to adduce any evidence as to her position as administratrix, and I do not think the fact that the letters of administration were tendered and admitted in evidence makes any difference. These letters of administration referred only to something which was not in issue at all, and the plaintiff did not need to put them in. All this being so, how can I now deal with the question? No motion to amend the defence was made. The case went to the jury as the pleadings stood, and they were not asked to find any verdict as to the administration. The record still stands in that position. I surely cannot now allow an amendment and myself try the issue which would be raised by it. This appears to me to be of itself sufficient to shew that the mere fact that the plaintiff in her own evidence stated a circumstance which would raise some doubt as to the truth of an allegation made by her on the record and admitted by the defendants, cannot now be taken advantage of by the defendants, who neither got nor asked for leave to amend

their defence by denying that allegation in order to raise now an issue which the jury are no longer here to try.

It was also contended that as the plaintiff is an infant she can only sue by her next friend. But the statute, in my opinion, settles that question. Section 3 says that the action "shall be brought by and in the name of the executor or administrator of the person deceased." As the plaintiff is admitted on the record to be the administratrix there was no other way to bring the action than by her and in her name.

The Deputy Clerk at Medicine Hat is therefore directed to enter judgment for the plaintiff for the sum of \$4,500 and costs as of the date of the rendering of the verdict.

Judgment for plaintiff.

D. G. White, solicitor for plaintiff.

Lougheed & Bennett, solicitors for defendants.

See next case.

ALBERTA.]

[SUPREME COURT.

TOLL V. CANADIAN PACIFIC R.W. CO.

(1 *Alia*. L.R. 318.)

Negligence—Action by executor or administrator under Lord Campbell's Act (C.O. (1898) ch. 48)—Railway law—Railway Act—Pleading—"Not guilty by statute"—Jury—C.O. (1898) 28—Constitutional law—The body of common and statute law continued under "The Alberta Act"—The effect of the repeal of the North-West Territories Act (R.S.C. (1886) ch. 50), by schedule "A.," R.S.C. (1906) as amended by 6 & 7 Edw. VII. (Dom.) ch. 44—Executors and administrators—Grant of probate, or letter of administration to an infant—Right to sue—Practice—Next friend—Irregularity—Waiver—Rule 538—Evidence—Wrongful reception of evidence—Acts of party charged with negligence to prevent occurrence of accidents in future—Insufficiency of evidence—Withdrawing case from jury—Assessment of damages under C.O. (1898) ch. 48, sec. 3—Province of Judge and jury—Excessive damages.

"The Ordinance respecting juries" was not brought into force in this Province by reason of the repeal of the North-West Territories Act by R.S.C. (1906) ch. and schedule "A." (R.S.C. vol. 3, p. 2941).

The effect of 6 & 7 Edw. VII. (Dom.) ch. 44, considered. Independently of "The North-West Territories Act, 1905" (4 & 5 Edw. VII. (Dom.) ch. 27) the effect of the Alberta Act was not to repeal the former North-West Territories Act, but to prevent its remaining in force *proprio vigore*; and to continue (sec. 16) in force, the law therein contained as a body of law, in the same manner as the common and statute law of England, as it stood on July 15th, 1870, was introduced into the Territories.

If an infant sues, without naming a next friend, it is a mere irregularity, and may be waived by an unconditional appearance of the defendant. But quite independently of waiver there must in every case be some stage at which it is too late to take advantage of a mere irregularity. In any case the Judge can deal with it under rule 538.

Letters of administration granted to an infant are not void, but voidable; and *semble*, until revoked the infant can sue, *qua* administrator, and need not be represented, when so suing, by a next friend.

In an action for negligence, it is not improper to receive evidence as to what may have been done by the defendants subsequently to remedy the defects or dangers complained of, but the jury should be warned that such evidence taken by itself is no evidence of negligence. If there be no other evidence of negligence the case should be withdrawn from the jury.

The evidence in this case considered, as to whether the case should have been left to the jury or not.

It is within the discretion of the trial Judge to submit special questions to the jury or not; but in either case the jury may render a general verdict.

The words "the Court may give such damages," in C.O. (1898) ch. 48, sec. 3, means the Judge at trial, or the Judge and the jury, as the case may be.

Semble, a verdict for \$4,500, under the circumstances of this case, cannot seriously be excepted to.

THIS was an appeal by the defendant from the judgment of Stuart, J., refusing the defendant's motion for nonsuit and for dismissal of the action, made at the trial, and from his subsequent judgment* (*ante* p. 244) in favour of the plaintiff on the verdict of the jury for \$4,500 and costs, on the grounds indicated in the arguments of counsel, and the judgment of the Court.

The plaintiff, Lily Toll, sued under C. O. (1908) ch. 48, as the administratrix of the estate of Rodger John Toll, to recover damages, alleging that the deceased came to his death owing to the negligence of the defendants.

*See, however, the remarks of the learned Judge in delivering judgment in *Winterburn v. C.P.R.*, 1 Alta. L.R., p. 307 *et seq.*

The following statement of facts is extracted from the judgment of Beck, J:—

The accident occurred at a siding on the defendants' main line at a place called Bantry.

The deceased left Medicine Hat in charge as engineer of engine No. 1134, drawing a train consisting of a water car, three box cars, thirty flat cars, and a caboose. This was an extra train bound westward for the gravel pit at Crowfoot, near Bantry siding, which lies between Medicine Hat and Crowfoot. The foreman, McColl, who was on the deck of the engine, heard the door on the right side of the cab of the engine violently slam to and some of the glass in it breaking. Looking in he saw the deceased lying on the floor of the cab with his head and shoulders against the door. McColl being unable to open the door because the deceased's body was against it, crawled through the opening made by the broken glass in the top of it and stopped the engine. He examined the deceased, found him unconscious and bleeding at the right ear and matter running out of his nose. He was taken on to Brooks, the next station, and from there carried back to Medicine Hat, where he died the next day. The post-mortem examination disclosed the fact that there was a large bruise over the left ear and an operative wound, that there were some pieces of bone missing above the left ear, that there were three fractures of the skull and a laceration of the brain. The medical witness who made the post-mortem examination gave as his opinion that the deceased's death was due to hemorrhage from branches of the middle cerebral artery caused by some hard object coming into contact with the head, or the head coming into contact with some hard object. I think there is no room for doubt upon the evidence that this hard object was a ledgerwood post planted by the defendants a week before the accident between the main line of the railway and the siding at Bantry, which runs for about 2,500 feet parallel with and at a distance of nine feet north of the main line. This post was a foot thick, and from 14 to 16 feet above

the ground, which made it higher than the cab of a locomotive. On the afternoon of the 11th of June, the day following the accident, Cassidy, a conductor in the defendants' employ, acting under the instructions of the railway superintendent of the division, stopped the engine of his train opposite this post and made measurements to it from the cab window, which established the fact that the distance between the window and this post was twenty-two and a half inches, the engine being of the same type as No. 1134.

The blow that the deceased received was, it is clear, dealt to him between the mile posts placed upon the main line east and west of Bantry siding. At the east mile post he was uninjured for he blew the whistle of his engine there, and the train was stopped after his injuries were sustained at the west mile post. There was no obstacle between these mile posts by which he could have been struck except the ledgerwood post. There was nothing, so far as one can judge, in the inside of the cab that would have inflicted these injuries. The deceased had been wearing a cap, but it was not found on his head or in the cab after he was hurt. The cab projected over the rail for over two feet, and the running board from the cab to the pilot projected over the rail two feet at its narrowest point. The deceased had been leaning out of the window shortly before this, and the evidence shews that in the discharge of his duty it would be proper for him to extend his body a considerable distance out of the window to inspect the injector under the cab, which it was shewn was not working properly, and that if he did so his body would be projected out of the window for more than two feet.

The appeal was heard July 18th, 1908.

R. B. Bennett, K.C., for the appellants:—There was no actionable negligence on the part of the defendant. The post which it is alleged caused the death of Toll was not so dangerously constructed or placed as to imply negligence. It is only conjecture that it caused the accident; it might have been caused

by something else, e.g., a stone: *Montreal Rolling Mills v. Corcoran* (1896), 26 S.C.R. 600; *Wakelin v. London & South Western R.W. Co.* (1886), 12 App. Cas. 41, 56 L.J.Q.B. 229, 55 L.T. 709, 35 W.R. 141, 51 J.P. 404 H.L. (E.). "Mere allegation or proof that the company was guilty of negligence is altogether irrelevant. The plaintiff must allege and prove, not merely that they were negligent, but that their negligence caused or materially contributed to the injury": *Per* Lord Watson, *ibid.*: *Farmer v. Grand Trunk R.W. Co.* (1891), 21 O.R. 299; *Ellis v. Great Western R.W. Co.* (1874), 43 L.J. C.P. 304, L.R. 9 C.P. 551, 30 L.T. 874; *Skelton v. London & North Western R.W. Co.* (1867), 36 L.J.C.P. 249, L.R. 2 C.P. 631, 16 L.T. 563, 15 W.R. 925; *Plouffe v. Iron Furnace Company* (1905), 5 O.W.R. 758, 6 O.W.R. 500; *Armstrong v. Canada Atlantic R.W. Co.* (1902), 4 O.L.R. 560; *Cowans v. Marshall* (1897), 28 S.C.R. 161; *Canadian Colored Cotton Mills v. Kervin* (1899), 29 S.C.R. 478, 28 O.R. 73; *Tooke v. Bergeron* (1897), 27 S.C.R. 567; *Canada Paint Co. v. Trainor* (1898), 28 S.C.R. 352; *Wood v. Canadian Pacific R.W. Co.* (1899), 30 S.C.R. 112; *Crafter v. Metropolitan R.W. Co.* (1866), L.R. 1 C.P. 300, 35 L.J.C.P. 132, 1 H. & R. 164, 14 W.R. 344, 12 Jur. (N.S.) 372; *Dominion Iron & Steel Co. v. Day* (1903), 34 S.C.R. 387.

An infant can only sue by next friend: *Cox v. Wright* (1863), 11 W.R. 870, 9 Jur. N.S. 981, 32 L.J. Ch. 770, 8 L.T. 631, 2 N.R. 436; *Dagenais v. Dagenais* (1903), 7 Q.P.R. 32; *Hindmarsh v. Chandler* (1817), 7 Taunt. 480, 1 Moore 250; *Geilinger v. Gibbs* (1897), 1 Ch. D. 482, 66 L.J. Ch. 230, 76 L.T. 111, 45 W.R. 315.

The Judicature Act (1898), C.O. ch. 21, does not contemplate an action at the instance of an infant only.

See also *Wade v. Keefe* (1888), 22 L.R. Ir. 154; cf. *Flight v. Bolland* (1828), 4 Russ. 298, 38 E.R. 817, 38 R.R. 817.

It is not competent to issue letters of administration to an infant: *Walker & Ellgood on Executors*, 11, 135; *Williams on Executors*, 159, 359; *Eversleigh on Domestic Relations*, 240; *Merchants Bank v. Monteith* (1884), 10 Pr. R. 334.

In this case the Master in Ordinary said: "No cases have been cited to me to sustain the claim, and therefore I must hold that the grant of administration was void and that the defendant being an infant was incapable of bringing suit in his own name or of making himself or the estate he assumed to represent liable for the costs of the extensive litigation in which he appears to have been a party." Cited with approval in *Tristan & Cote's Prob. Prac.*, 73-171.

Jud. Ordinance r. 588 requires a bond on issue of letter of administration. The bond of an infant is void: *Leake on Contracts*, p. 378. *Beam v. Beatty* (1902), 4 O.L.R. 554, 2 O.L.R. 362.

The defendant could rely on the fact disclosed in evidence that the plaintiff was incompetent, on above grounds, to maintain the action, apart from the pleadings, by demurrer *ore tenus*.

"Not guilty by statute" (Railway Act, sec. 306) puts the plaintiff to proof of every fact necessary to her cause of action, including her right to sue as administratrix: *Grand Trunk R.W. Co. v. Attorney-General* (1907), A.C. 65, 76 L.J.P.C. 23, 95 L.T. 631, 23 T.L.R. 40.

The common law plea of "not guilty" was abolished by the Judicature Act, but the plea "not guilty by statute" remains unchanged, the defendant being required to note in the margin the statute relied on, and being prohibited from joining, save by special leave, any other defence: R.S.C. 1883, Order 19, r. 21, Order 21, r. 19, Judicature Ordinance, sec. 113: *Smith v. Canadian Pacific R.W. Co.* (1901), 21 C.L.T. 193; *Daniel v. Canadian Pacific R.W. Co.* (1907), 6 West. L.R. 538.

The general issue by statute lets in not only defences given by the statute, but also those which would have arisen at common law: *Ross v. Clifton* (1841), 11 Ad. & E. 631; *Langford v. Woods* (1844), 7 M. & G. 629. And also defences resting partly on the statute and partly at common law: *Maund v. Monmouthshire Canal Co.* (1842), 4 Man. & G. 452, 3 Railway Cas. 159, 5 Scott (N.R.) 457, 1 Carr. & M. 606, 2 D. (N.S.) 113, 11 L.J.C.P. 317, 6 Jur. 932. It also extends to new assignments: *Mason v.*

Newland (1840), 9 C. & P. 575; *Legge v. Boyd* (1848), 1 M. & G. 902, 1 C.B. 92, 14 L.J.C.P. 138, 9 Jur. 30; *Williams v. Jones* (1839), 11 Ad. & E. 643; *Eagleton v. Gutteridge* (1843), 11 M. & W. 465, 2 D. (N.S.) 1053, 12 L.J. Ex. 359.

In view of the provisions of our practice it is submitted that the English Marginal Rule 238, to which reference was made by the trial Judge, is not in force in this Province, at least in an action brought under chapter 48 C.O. (1898), which must be brought by the executor or administrator of the person deceased, against a railway company or any public company authorized to plead not guilty by statute.

In any event the appeal court can direct an amendment: *Ecklin v. Little* (1890), 6 Times Rep. 366, 34 Sol. Jo. 546.

In any case there should be a new trial.

(a) The provisions of "The Jury Ordinance" (C.O. ch. 28) were disregarded, and we contend this ordinance came into force when secs. 71 and 88, N.-W. T. Act were repealed, as they were on 31st January, 1907. (R.S.C. (1906) schedule A. vol. III., p. 2941.)

The learned counsel's argument on this branch of the case is fully indicated in the judgment of Beck, J., *infra*.

(b) Evidence of the subsequent change of the position of the post was improperly admitted: *Hart v. Lancashire & Yorkshire R.W. Co.* (1869), 21 L.T. (N.S.) 261. "People do not furnish evidence against themselves simply by adopting a new plan in order to prevent a recurrence of an accident. I think that a proposition to the contrary would be barbarous. It would be, as I had often had occasion to tell juries, to hold that because the world gets wiser as it gets older therefore it was foolish before": *Per Bramwell, B., ibid.* 263; *Columbia R.W. Co. v. Hawthorne* (1892), 144 U.S. 202; *Diamond Match Company v. Newhaven*, 3 Am. St. R. 7073; *Sanitary Commissioners of Gibraltar v. Orfila* (1890), 15 App. Cas. 400, 59 L.J.P.C. 95, 63 L.T. 58 P.C.; *Great Western R.W. Co. v. Davies* (1878), 39 L.T. (N.S.) 475.

(c) The damages should have been assessed by "the Court" in accordance with C.O. (1898) ch. 48, sec. 3.

(d) Questions should have been submitted to the jury in accordance with the request of counsel for the defendant company: *Pritchard v. Long* (1889), 5 T.L.R. 639, 9 M. & W. 666, 1 D. (N.S.) 883; 11 L.J. Ex. 306; *Spencer v. Alaska Packers* (1904), 35 S.C.R. 373; *Mader v. Halifax Electric Tramway Co.* (1901), 37 S.C.R. 98.

(e) The damages were excessive: *Central Vermont R.W. Co. v. Franchere* (1904), 35 S.C.R. 68.

W. L. Walsh, K.C., for respondent. After reviewing the facts:—The plaintiff says that the evidence points irresistibly to the conclusion that Toll's death was caused by his head coming into contact with this post and that the placing of it so close to the window of the cab was such negligence on the part of the defendant as to make it responsible in damages for his death.

The placing of this post so close to the track was in plain violation of the company's rule, which calls for a distance of at least six feet between the track and anything in the nature of an obstruction.

Upon this evidence the case could not have been withdrawn from the jury and the verdict of the jury should not be interfered with.

The plaintiff's representative capacity.

The defendant's contention is that inasmuch as the plaintiff in answer to a question from her counsel gave her age at the date of the trial as 18, she cannot maintain this action, the grant of administration to her being void, because of her minority. The plaintiff says that it is not open to the defendant on the pleadings to make this contention.

Paragraph 1 of the statement of claim specifically alleges that the plaintiff is the administratrix of the estate of Rodger John Toll deceased. This allegation is not denied by the statement of defence, for it is not put in issue by the plea of not guilty by statute, which is the only plea under which it can be contended that this issue is raised, and not being denied is therefore admitted.

In any event the grant of administration to the plaintiff is not void. It might be revoked upon a proper application made for that purpose by some one competent to make it upon the ground now urged against it, but until revoked it is a perfectly valid grant and quite sufficient to entitle the plaintiff to maintain this action: *Re Ivory* (1878), 10 C.D. 372, 39 L.T. 285, 27 W.R. 20 C.A.; *Eads v. Maxwell* (1858), 17 U.C.Q.B. 179; *Irwin v. Bank of Montreal* (1876), 38 U.C.Q.B. 387; *Dini v. Fauquier*, 8 O.L.R. 712; *Book v. Book* (1887), 15 O.R. 119, 21 Occ. N. 111, 1 O.L.R. 86.

The Jury: The plaintiff submits that the objection raised by the defendant to the regularity of the procedure under which the jury was summoned, as set out in its counsel's challenge to the array, is disposed of by the judgment of the Supreme Court of the North-West Territories *en banc* on the second appeal in *Hanson v. The Canadian Pacific Railway Company* (1906), 4 W.L.R. 385, affirmed on appeal to the Supreme Court of Canada.

The judgment of the Court was delivered by

July 24, 1908. BECK, J.:—This is an action by an administratrix under C.O. (1898) ch. 48, entitled "An Ordinance respecting compensation to the families of persons killed by accidents." It was tried before Stuart, J., with a jury. The jury gave a verdict for the plaintiff with \$4,500 damages and judgment was directed to be entered accordingly. The case is now before us on a motion to set aside the verdict and judgment and either to enter a judgment for the defendant or to direct a new trial.

A number of grounds were argued:—

(1) At the opening of the case there was a challenge to the array on the ground that C.O. 1898, ch. 28, intituled "An Ordinance respecting juries," is in force, and the jury were not summoned in accordance therewith.

It might be sufficient, I suppose, to say that the appeal book, though containing the formal challenge and a note of the learned trial Judge's decision disallowing it, contains no notes of any

evidence whatever with regard to the matter, so that we are left without any material by which to find the facts.

In my opinion, however, the Ordinance in question is not in force in this Province.

Section 20 provides that the Ordinance shall come into force and take effect immediately from and after the repeal of secs. 71 and 88 of the North-West Territories Act. The Alberta Act (4-5 Edw. VII. (1905) ch. 3), whereby the Province of Alberta was established, came into force by virtue of a provision contained in it on the 1st September, 1905.

Section 16 of that Act provides that "all laws . . . so far as they are not inconsistent with anything contained in this Act or as to which this Act contains no provision intended as a substitute therefor . . . existing immediately before the coming into force of this Act in the territory hereby established as the Province of Alberta . . . shall continue in the said Province as if this Act . . . had not been passed; subject nevertheless (except, etc.), to be repealed, abolished, or altered by the Parliament of Canada or by the legislature of the said Province, according to the authority of the parliament or of the said legislature. . . ." At the same session of parliament the North-West Territories Act, 1905 (4-5 Edw. VII. ch. 27) was passed. It took effect also on the 1st September, 1905. It did not expressly purport to repeal the North-West Territories Act, but excluded from the North-West Territories, and consequently from the operation of the Act, *inter alia*, "The Province of Alberta."

My opinion is that quite independently of the latter Act the effect of the Alberta Act was not to repeal the North-West Territories Act, but to cause the portion of the Territories comprised in the Province to cease to be subject to the provisions of the North-West Territories Act *proprio vigore*, and to continue the law therein contained as a body of law which, having regard to the subject matter, was subject to the legislative jurisdiction of the parliament of Canada, or of the legislature of the Province, as the case might be, in the same manner as the common law and

statutory law of England, as it stood on the 15th July, 1870, was introduced into the Territories.

By 6-7 Edw. VII. ch. 43, sec. 4, it is provided that the several Acts enumerated in schedule A., are and have been repealed on and from the 31st January, 1907, to the extent mentioned in the schedule. The whole of the North-West Territories Act, R.S.C. (1886) ch. 50, is tested in the schedule.

It was argued that this was a repeal of secs. 71 and 88, so as to bring into operation the Jury Ordinance. There are two answers to this:—

(1) It was by virtue of the Alberta Act, making applicable to the Province as it did with some exceptions, the B. N. A. Act, beyond the powers of the Dominion Parliament to legislate with respect to procedure in civil cases.

(2) The North-West Territories Act, 1905, had already by implication amended the North-West Territories Act so as to cause it, at the time of its repeal, to have no application to the Province of Alberta.

By 6-7 Edw. VII (1907) ch. 44, the Parliament of Canada purported to amend the above-mentioned schedule A., by providing that the repeal of the North-West Territories Act should not apply to the Province of Alberta, and that this provision should be deemed to have been in force on and since the 31st January, 1907. The latter Act, of course, was of equal validity or invalidity to the former Act, so that neither can affect the question now under consideration. For the reasons I have given, I am of opinion that the Jury Ordinance is not yet in force in this Province.

It appeared during the course of the plaintiff's examination as a witness at the trial that she was under the age of 21 years, and counsel for the defendants contended that the letters of administration granted to her were consequently void, and that, therefore, she could not maintain the action. It is undoubtedly a rule of practice in England to refuse administration to an infant. This practice is based on the analogy to, and the reason which led to, the passing of sec. 6 of 38 Geo. III. ch. 87 (Im-

perial), prohibiting the grant of probate to infants under the age of 21 years.

In my opinion the grant of letters of administration to an infant, though perhaps inexpedient and admittedly contrary to the practice of the Court, is not void; they are at most irregular, and therefore valid until set aside. I doubt even if letters probate granted to an infant would not also be merely voidable. Any other view might lead to great inconvenience and injury to innocent parties.

It was contended that even though the grant of letters of administration was valid, still the plaintiff being an infant cannot maintain her action without a next friend. I do not think the objection is one which, if valid, the Court was bound to give effect to. In *Ex parte Brocklebank* (1877), 6 Ch.D. 359, 46 L.J. Bk. 113, 37 L.T. 282, 25 W.R. 859, it is said: "In the Court of Chancery a suit on behalf of an infant was brought in his name by a next friend in order to give security for the costs of the defendant, but if the suit had been commenced without the intervention of a next friend, and the defendant chose to appear, I know of no reason why it should not have been prosecuted without a next friend. Probably if in the present case an application had been made by the debtor in the first instance, that some adult person should be named for the purpose of giving security for the costs of the debtor's summons, the application would have been successful."

The object of having a next friend is to give security for costs to the defendant. The irregularity (of an infant plaintiff suing without a next friend) may be waived by the unconditional appearance of the defendant: (An. Prac. 1908, p. 171, citing in *Ex parte Brocklebank* (1877), 6 Ch.D. 359, 46 L.J. Bk. 113, 37 L.T. 282, 25 W.R. 859.) The ground stated is wholly illusory because the next friend is not bound to give security for costs, even though he be admittedly impecunious and a stranger.

No doubt it cannot be said that the defendant in the present case knowingly did anything to waive the irregularity, if it was an irregularity. English O. 16, rule 16, provides that infants

may sue as plaintiffs by their next friends in manner heretofore practised in the Chancery Division . . . I find no corresponding rule under our Judicature Ordinance; but I assume the above rule is in force here.

Assuming that there was an irregularity, and that the obligation on the part of an infant to sue by a next friend is imposed by the above rule, then it was, under rule 538 (English O. 70, rule 1), entirely within the discretion of the trial Judge as to what effect he should give to it. If the obligation was not imposed by the above quoted rule, but only by the practice of the Court, I think the Judge's power was the same. *Smith v. Baker* (1864), 2 H. & M. 498, 4 N.R. 321, 10 L.T. 599, and *Ferrand v. Mayor of Bradford* (1856), 8 De G. M. & G. 95, 25 L.J. Ch. 389, 21 Beav. 422, 2 Jur. N.S. 360, 4 W.R. 350, 44 E.R. 324, are authorities shewing that prior to the Judicature Act, and independently of any similar rule to rule 528, the Court has power to condone irregularities. There must in every case be some stage at which, quite independently of waiver, it must be too late to take advantage of or to give effect to a mere irregularity. (See *Millson v. Smale* (1894), 25 O.R. 144.) The learned trial Judge did not deal with it as an irregularity. Had he thought an irregularity existed, I think he might, under the circumstances, have declined to give effect to it, or have allowed the plaintiff an opportunity to amend by adding a next friend: *Flight v. Bolland* (1828), 4 Russ. 298, 38 E.R. 817, 38 R.R. 817; and if this latter course should be held to be necessary in order to save the action, I think this Court has power to authorize the amendment now, and should exercise that power. I am, however, inclined to the opinion that no irregularity existed. Having held that the plaintiff was validly appointed administratrix, I think it must follow that in so far as she acts in that capacity, she is freed from all disabilities arising from her infancy, and this notwithstanding the case of *Hindmarsh v. Southgate* (1827), 3 Russell 324, 27 R.R. 81, and *Stott v. Meacock* (1862), 31 L.J. Ch. 746, 6 L.T. 592, 10 W.R. 605, which if they are to be followed would indicate that there are nevertheless some limita-

tions, not upon the rights, but upon the liability, of an infant executor or administrator.

At the trial, objection was made to evidence as to what the defendants had done subsequently to the accident with respect to the post which it was alleged was the occasion of the accident. The objection was that such evidence was not admissible. The learned trial Judge admitted the evidence. The only English authorities appear to be the following:—

Bramwell, B., in *Hart v. Lancashire & Yorkshire R.W. Co.* (1869), 21 L.T. (N.S.) 261: "People do not furnish evidence against themselves simply by adopting a new plan in order to prevent the recurrence of an accident. I think that a proposition to the contrary would be barbarous. It would be (as I have often had occasion to tell juries), to hold that, because the world gets wiser as it gets older, therefore it was foolish before."

Coleridge, L.C.J., in *Beever v. Henson* (1892), 25 L.J. Notes of Cases 131: "Now a perfectly humane man naturally makes it physically impossible that a particular accident which has once happened can happen again, by fencing or covering, or at any rate making safe the particular thing from which it arose. That, however, is no evidence of, and I protest against its being put forward as evidence of, negligence. A place may be left for a hundred years unfenced, when at last someone falls down it; the owner, like a sensible and humane man, then puts up a fence; and upon this the argument is that he has been guilty of negligence, and shews that he thought the fence was necessary because he put it up. This is both unfair and unjust. It is making the good feeling and right principle of a man evidence against him."

Both the learned Judges quoted were evidently referring to cases in which the evidence was in fact given and was consequently actually before the jury, I think the correct view is that in an action for negligence, evidence of repairs, improvements, removal, substitution, or the like done after the occurrence of an injury is if it stand entirely alone, no evidence of negligence, but that such evidence is admissible because it is logically rele-

vant. It may in any case, and does in fact in most cases, become the logical foundation for evidence of other admittedly relevant facts arising out of it, such as declarations made at the time or the consequent disclosure of the more or less latent condition of the object which occasioned the accident. In most cases it would be almost impossible in practice to exclude evidence of the fact. I think that though standing alone such evidence would not afford evidence in which a jury could reasonably find negligence, yet it is a circumstance which, in connection with other evidence, they have a right to consider. If there was no other evidence relevant to the question of negligence, it would, of course, be the duty of the trial Judge to withdraw the case from the jury. If there was additional evidence, it would be the duty of the trial Judge to warn the jury that evidence of subsequent repairs, improvements, removal, substitution or the like, taken by itself, is no evidence of negligence. I think, therefore, the evidence objected to was properly admitted.

In his charge to the jury the learned trial Judge said:—

“There are just one or two things, possibly observations, that I might make in regard, for instance, to the bearing of the evidence about the removal of the post afterwards. That is taken by the plaintiff’s counsel as an admission on the part of the defendants that the existence of that post in the place it was, was a source of danger, and that it was negligence on their part to have it there, and that it was the existence of that post in the place in which it was that caused Toll’s death. Just how far you can make that deduction from what the defendants did is a matter of very grave question, in my mind. It would immediately occur to anyone that that might possibly be the reason of his death, and I do not know that you are entitled to draw any stronger inference from this than that the Canadian Pacific Railway removed it, and they were going to see that if it had caused that man’s death, it should not cause anyone else’s death.

It seems to me that this constituted a sufficient warning to the jury.

It was submitted by counsel for the defendants that there

was no evidence of negligence. In my opinion there was. . . . (The learned Judge here makes the *resumé* of facts as given in the preceding statement of facts, and proceeds):—I think this *resumé* of the facts shews that it would have been improper for the trial Judge to withdraw the case from the jury, and that their verdict cannot be disturbed on the ground of there being no evidence to support it.

Counsel for the defendant submitted that it was the duty of the trial Judge to have acceded to his request that questions be submitted to the jury. He cited *Pritchard v. Long* (1889), 5 T.L.R. 639, 9 M. & W. 666, 1 D. (N.S.) 883, 11 L.J. Ex. 306; *Spencer v. Alaska Packers* (1904), 35 S.C.R. 373; *Mader v. Halifax Electric Tramways Co.* (1901), 37 S.C.R. 98: "It is clear, however, that there is no obligation on the part of the Judge to do so, that it is wholly in his discretion, but that some eminent Judges deem it expedient to do so in an action of negligence. It is clear too that in this jurisdiction a jury is not bound to answer questions; the submitting to them of questions is in effect asking them to give a special verdict; they are undoubtedly at liberty nevertheless to render a general verdict.

Counsel for the defendants further contended that the damages should have been assessed not by the jury, but by the Judge, inasmuch as the Ordinance in question says: "The Court may give such damages," etc. It seems to me that "the Court" in this case means the tribunal, whether consisting of a Judge alone or a Judge and a jury, before whom the action is tried. At all events the Judge did by his judgment founded upon the jury's verdict give the damages which the jury estimated and which it may be presumed were in agreement with his own opinion. It is true that as a further ground of appeal it was contended that the damages were excessive, but though this ground was also adverted to in the appellants' factum, it was not pressed in argument, and it seems to me the contention could not be seriously made, especially in view of the decision of this Court in *Hanson v. C. P. R.* (1906), 4 W.L.R. 385, not yet reported, except on another ground, where, against the objection that the damages,

\$6,500, for the loss of a foot by a man in much the same station in life, were excessive, the Court sustained the verdict. In my opinion, therefore, the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants, *Lougheed & Bennett.*

Solicitor for the respondent, *D. Guthrie White.*

AGREEMENT—PROPERTY—MEANING OF.

BRITISH COLUMBIA.]

[WILSON, Co. J.
[SUPREME COURT.]

EAST KOOTENAY LUMBER CO. v. CANADIAN PACIFIC RY. CO.

(13 B.C.R. 422.)

Agreement—Construction of—Freedom from liability for damage a consideration—"Property," meaning of—General words—Ejusdem generis.

In consideration of the construction of a siding to their mill premises, plaintiff company entered into an agreement with the railway company freeing them from liability for damage to the "siding or to buildings, fences or other property whatsoever" of the plaintiff company "or of any other person." Two horses of the plaintiff company, engaged in hauling a car from one part of the siding to another, were killed by being run down with a car sent on the siding by a flying switch:—*Held*, reversing the finding of Wilson, Co. J., that the word "property" in the agreement was not confined to fixtures, buildings and rolling stock, and that the horses were properly included.

APPEAL from the judgment of Wilson, Co. J., in an action tried before him at Cranbrook on the 18th and 20th of April, 1907. The facts are set out in the reasons for judgment of the learned trial Judge.

Harvey and M. A. Macdonald, for plaintiff company.

Gurd, for defendant railway company.

July 16, 1907. WILSON, Co. J.:—This action was brought to recover damages for the loss of two horses of the plaintiffs killed by the defendants on a spur siding to the plaintiffs' mill.

The facts as I find them are as follows: The defendants were hauling and switching cars on the spur on the morning of the accident and prior to the engine leaving, the plaintiff yard foreman, Leitch, asked the defendants' yard foreman, Pushee, who was in charge of the train and crew if they were coming on the siding again that day. Pushee replied no, I won't bother you any more to-day. The plaintiffs' yard foreman then called to the teamster to get his team hitched to the car standing there and haul it to a point on the main line. I must find that Pushee heard this conversation between the teamster and Leitch. The teamster then hitched his team to the car and was hauling it toward the main line, when the defendants' switch engine sent into the spur two cars by what is known as a flying switch. These two cars ran in a short distance, met the team hauling the other car and killed the horses. I find, therefore, that the plaintiffs acted in a careful manner, that the defendants' foreman, Pushee, after the conversation with Leitch did not use due care and that it was solely by reason of that negligence that the accident happened. A question was raised as to the plaintiffs making a proper use of the tracks by using horses to haul cars. I find that the company did not place cars in position as desired, and no stronger evidence could be adduced than the conversation between Leitch and the teamster in Pushee's presence, when he instructed the teamster to haul the car to another point. If the company had been placing cars, surely the plaintiffs would not have had the car hauled to practically the other end of the yard. The car could not be moved by hand up the grade and I find it was a reasonably proper use of the tracks to have the car hauled by the team in the manner in which it was hauled and in so doing the plaintiffs used all reasonable care.

The defendants as a further defence claim that they are released from liability on the agreement between the parties. The section in that agreement that is relied on reads as follows:—

“6. That the railway company shall not be responsible for any damage or injury to the said siding or to buildings, fences, or other property whatsoever of the party of the second part, or

of any other person or persons whomsoever in or upon the said buildings and premises, by fire or sparks communicated from any locomotive or car of the railway company, or by any other cause, or for any other injury which may be done to such buildings, fences, property, or siding, by any locomotive, car or train of the railway company, or for any loss of the contents of any car which may have been placed on the said siding for the party of the second part; whether such damage or injury or loss be caused by defects in the plant or machinery of the railway company, or by the negligence or default of its agents or employees or otherwise howsoever; and the party of the second part will hold the railway company harmless against all claims of any person or persons whomsoever, for damages or injuries to or loss of any car or property which may be in or upon the said siding, buildings and premises; it being hereby declared that the assumption by the party of the second part of the risk of such damage or loss, and of the same being caused by defects in the plant or machinery of the railway company, or by the fault or negligence of its agent or employees is one of the considerations for the execution by the railway company of the present agreement, without which such execution would not have taken place. And the party of the second part will indemnify the railway company from all loss of or injury to any of its property or the contents of any of its cars while in or upon any portion of the said siding, buildings, and premises, caused otherwise than by the negligence of the railway company, its agents or employees. And the party of the second part will compensate the railway company for all loss or damage caused to it or its plant or rolling stock by any default of the party of the second part in the performance of any of the conditions contained in the present agreement to be performed by the party of the second part."

Under that section it seems to me that the present accident was not taken in view, as the accident to the horses does not come within the purview of the section as it deals only with fixtures and rolling stock. After the careful argument by the defen-

dants' counsel I cannot see my way clear to change my view and I therefore find that the plaintiffs are entitled to recover.

The appeal was argued at Vancouver on the 8th of April, 1908, before Irving, Morrison and Clement, JJ.

Davis, K.C., for appellants (defendant) railway company:—We are released from liability under clause 6 of the siding agreement. The *ejusdem generis* rule of construction is applicable here, and therefore horses are included in the term "property": *Anderson v. Anderson* (1895), 1 Q.B. 749; *In re Stockport Ragged, Industrial, and Reformatory Schools* (1898), 2 Ch. 687.

He was stopped.

Sir C. H. Tupper, K.C., called upon for respondents (plaintiff) company:—The agreement must be considered with regard to circumstances. It is putting upon it an extreme construction to say that even as regards their fixtures, plaintiff company were to be at the mercy or caprice of the railway company's men. There was gross negligence displayed. The cars sent in on the switch which caused the damage were not for us, were not used by us, and were afterwards taken out and used elsewhere. The custom was for the railway company to notify us when they wanted to use the siding for their own purposes.

Davis, called upon as to wilful misconduct on the part of the railway company:—There was no case made out or raised that the horses were killed intentionally. Negligence only was set up, and on the agreement we are relieved from the consequences.

IRVING, J. (after stating the facts):—The learned County Court Judge came to the conclusion that the siding agreement, by which the lumber company undertook not to hold the railway company responsible for damages was inapplicable to the horses injured on this occasion, because, in his opinion, horses, being movable property, did not come within the purview of the agree-

ment. Upon that point we all agreed that he was wrong. I think the appeal must be allowed.

MORRISON, J.:—I concur.

CLEMENT, J.:—I agree.

Appeal allowed.

HIGHWAY CROSSING—ABSENCE OF APPROVAL.

SASKATCHEWAN.]

[SUPREME COURT.]

BIRD V. CANADIAN PACIFIC R.W. CO.

(1 Sask. L.R. 266.)

Railway Crossing—Injury to Person Using—Defective Construction—Crossing not on Highway—Not Authorized by Board of Railway Commissioners—Dedication—Duty of Company to Fence—Time in Which Action Must be Brought.

Held (WETMORE, C.J., *hesitante*), that when a railway company establishes a crossing, not authorized by the Board of Railway Commissioners, over its railway, at a point other than on a highway and invites the public to use such crossing, it is the duty of the company to take every precaution for the safety of the public using such crossing and in view of the statutory provision requiring the company to fence the approaches to a railway crossing over a highway properly authorized, the failure of the company to so fence an unauthorized crossing constitutes such negligence as will render the company liable for injury to any person sustained on such crossing when the proximate cause of such injury is the failure of the company to fence.

Also, that the provisions of the Railway Act, 1903, as to the time in which actions may be brought apply to the Canadian Pacific Railway Company, and that the action was properly brought more than six months, but within one year after the date of the injury complained of.

THE tracks of the Canadian Pacific Railway crossed a public highway leading to the village of McLean and no crossing having been constructed by the company, the public were unable to use such highway, but were in the habit of crossing at another point. Subsequently the company erected a station at the point so used and constructed a crossing at a point about four hundred yards distant from the highway, and erected a

“Railway Crossing” sign thereon, and this crossing had, for some time, been used by the public as a highway. The municipality in which the highway was situated and also the Provincial Government, had refused to recognize this crossing, and, in fact, had filed a petition with the Board of Railway Commissioners for an order compelling the company to construct a crossing on the highway. The crossing so constructed by the company had never been sanctioned by the Board.

The crossing in question was some eight feet above the level of the highway and was reached by a graded approach about fifty-two yards in length and about 12 feet wide, the top being rounded. Where the grade approached the crossing there was a drop of about ten feet on each side. There was no fence on either side of the approach and the evidence shewed that it was impossible for two teams, going in opposite directions, to cross at the same time, and also that accidents had occurred on the approach apparently by reason of the narrowness of the same and the lack of fencing.

The plaintiff had occasion to use this crossing and when near the railway one of her horses shied with the result that the sleigh in which she was riding went over the embankment and she sustained injuries. She thereupon brought action to recover damages, which action was tried before Newlands, J., who gave judgment for the defendant, holding that as the crossing was not constructed on a highway, or authorized by the Board of Railway Commissioners, the company was not bound to fence as required by the Railway Act in the case of authorized crossing.

The plaintiff thereupon appealed and the appeal was argued before the Court *en banc*, consisting of WETMORE, C.J., PRENDERGAST and JOHNSTONE, JJ., at Regina on the 26th, 27th and 28th of February, 1908.

Frank Ford, K.C. (*R. A. Carman* with him): If sections 189 and 190 of the Railway Act, 1903, apply, the respondent is plainly liable, there being no fences and too steep a grade:

Holden v. Yarmouth, 3 Can. Ry. Cas. 74. The fact that the crossing was constructed by the respondent without the consent of the Railway Commissioners will not relieve it for failure to comply with the above provisions of the Railway Act if the appellant can bring the approach and crossing within the meaning of the Act. A highway is defined by sec. 2 of the Act, and the crossing and approach here come within the definition. The section in question being for the public safety should receive such liberal construction as will ensure the attainment of the spirit of the Act: *Township of Gloucester v. Can. At. Ry. Co.* (1902), 3 O.L.R. 89.

The respondent is estopped from contending that the act does not apply, by erecting the "Railway Crossing" sign and inviting the public to use the road and closing the legal highway: *Elliott on Roads and Streets*, secs. 125-142; *Enc. Laws of Eng.* (2nd ed.) title Estoppel, at p. 358; *Carr v. London & North Western R.W. Co.* (1875), 44 L.J.C.P., at p. 113.

Apart from its statutory obligation the company is liable at common law because, considering the dangerous character of the crossing, the respondent failed to provide a reasonably safe and adequate approach and crossing. It is the duty of a railway company to make its premises safe: *Elliott on Roads and Streets*, secs. 782-785; *Barnes v. Ward* (1850), 19 L.J.C.P. 195. The fact that the appellant's horses shied was not evidence of negligence, but the proximate cause of the accident was the negligence of the respondent: *Dickenson v. L. & N.W. Ry. Co.* (1865), 1 H. & R. 399; *Toms v. Corpn. of Whitby*, 35 U.C.Q.B. 195; *Sherwood v. Corpn. of Hamilton*, 37 U.C.Q.B. 410; *Foley v. East Flamborough*, 26 A.R. 46.

If the company had secured the consent of the Board to the construction of this crossing, they would have had to comply with the Act. If the respondent had not been guilty of the illegal act of opening the crossing, the accident would not have occurred, and the accident, therefore, was the reasonable con-

sequence of such illegal act: *Clark v. Chambers* (1878), L.R. 3 Q.B.D. 327, 47 L.J.Q.B. 427.

J. A. Allan, for the respondent: The evidence shews conclusively that the highway in question did not come within the operation of the section of the Act relied upon by the appellant. Section 186 describes how the construction of a highway across an existing railway may be authorized and no other authorization is provided by the Act and without the consent of the Board no such "highway" can be constructed: *G. T. R. Co. v. McKay* (1904), 34 S.C.R. 81, at pp. 96-98; *G. T. R. Co. v. Perrault* (1905), 36 S.C.R. 671, at p. 678; *Read v. Can. Atlantic Ry. Co.*, 4 Can. Ry. Cas. 272, at p. 276.

As to the contention of the appellant that the company having constructed the highway and invited the public to use it, they are bound to maintain it in a reasonably safe condition, the case went to trial on a record on the one hand alleging and on the other denying a *public highway crossing*, and the appellant cannot now set up a different case. The evidence, however, shews that the road was reasonably safe. Further no special invitation was given to use it, but in fact the municipality and Government refused to recognize the road as a highway. In any event the appellant was a mere licensee and the respondent cannot be held liable to the appellant for the absence of fences which she knew were not there.

In any event the action was brought more than six months after the accident and is too late. By the Consolidated Railway Act, 1879, sec. 27, all such actions must be brought within six months. This Act was, by the Special Act incorporating the respondent company, incorporated with and forms part of such Special Act, sub-sec. 2 of sec. 2, of the Railway Act of 1879. The charter of the respondent company is not a mere grant on the part of Parliament, but is a matter of contract between the Crown and the company. Clause 22 of the contract provides that the Railway Act, 1879, in so far as its provisions are applicable shall apply to the company and the schedules attached to the contract and forming part of the special Act; also pro-

vide that the Railway Act, 1879, shall be incorporated therewith. Manifestly, therefore, the provisions of the Railway Act of 1879 as to limitations of actions formed part of the contract and would not be subject to the changes subsequently introduced extending the time for bringing action to one year. *Clark v. Bradlaugh* (1882), 8 Q.B.D., at p. 69; *Zimmer v. G. T. R.*, 21 O.R. 628, at p. 632; *Seward v. Vera Cruz* (1885), 10 A.C. 59, at p. 68; *Headland v. Coster* (1905), 1 K.B. 219, at p. 227; *Northern Counties Investment Trust v. Canadian Pacific R.W. Co.* (1906), 13 B.C.R. 130, 7 Can. Ry. Cas. 164.

Ford, K.C., in reply.

March 31, 1908. WETMORE, C.J.:—I, with very great hesitation, agree with the result arrived at by my brother Johnstone in this case. I am satisfied that the defendants are not liable for statutory negligence; that is, for the omission to do something that the statute requires them to do. On the other hand, I quite agree with my brother Johnstone that the defendants, having constructed the way in question across the railroad and built the approaches thereof for the purpose of enabling the public to cross over the railroad, and having placed the signboard "Railway Crossing" there, invited the public to use the road and crossing for the purposes the company intended it for. That being so, they were bound to take reasonable precautions to prevent accidents occurring. I adhere to what I laid down in *Hansen v. Canadian Pacific Railway Company* (1906), 4 W.L.R., at p. 388, 40 S.C.R. 194, 7 Can. Ry. Cas. 429, 441, and cited by my brother Johnstone in his judgment.

The difficulty I have had in this case is in bringing my mind to the conclusion that the defendants were guilty of any actionable negligence at common law. It is claimed that the defendants were liable in respect of three acts of negligence namely:—

1. In constructing the road too narrow.
2. In rounding it.
3. In not fencing it on either side.

In view of the fact that the distance from the top of the structure to the bottom was so high, I am not very much impressed with the idea that the narrowness of the road made the structure a negligent one, or the fact that it was rounded. Twelve feet was not too narrow for a single team to pass easily, and the rounding did not strike me as anything more than the proper and usual crowning of a way of that description. I gather from the evidence that it never occurred to anyone that this structure was dangerous until this accident occurred. I may say that something was urged with respect to the grade of the approach. In the first instance, it occurs to me that the steepness of this grade was not very objectionable when we consider that the plaintiff's son, who was driving on the occasion of the accident, stated that he was going up it at the rate of seven miles an hour; and in the next place, this accident could in no sense be attributable to the steepness of the grade. It appears to me that the witnesses in testifying with respect to this crossing were testifying more in relation to its suitability for traffic than to its danger. Take, for instance, the following testimony of Carrol:

“Q. What is your opinion as to the nature of this crossing at the time the accident happened with respect to its adequacy for people going across there in safety? A. There had been several complaints made to me about the crossing before this accident occurred, and after.

“Q. What is your opinion as to the adequacy of that crossing as a public crossing at that time, and as to its safety for people going across with teams? A. It was all right with one team to cross, but two teams going across could not go past on that approach in safety.”

That would all seem to indicate that the witness had reference to the efficacy of the crossing—whether one could cross properly or safely with two teams. In this instance they were not crossing with two teams at the time the accident occurred. Then Rollins, speaking of the approach, testifies:—

“Q. Did you form at the time, any idea as to its width? A. Not exactly. It was my first experience on the crossing, and

I thought it was narrow; that it was narrower than the most I had ever heard of.

“Q. What is your opinion with respect to the nature of that approach; that is, taking teams across backwards and forwards there—is it a reasonably wide approach for teams? A. Not at that time I had reference to. It is in better shape now.

“Q. Is it a reasonably safe approach for crossing for teams, backwards and forwards? What do you say as to that at that time? A. I don't think it was in a proper condition at that time. The opinion I formed of it was that it was too narrow and that it was not high enough; that the track was so much higher; that it was hard to get up on the track.”

It is true that Rollins testified that he came on this crossing subsequently and got pitched off his sleigh, but there is no evidence to shew how that occurred. That may not have been occasioned by reason of the approach at all. It is just left there, so that piece of testimony proves nothing. Therefore, the testimony of Rollins does not carry the matter any further than that of Carrol. All this testimony seems to my mind, with its surroundings, to point, as I have before stated, in the direction that the witnesses were talking about the suitability of the road for traffic, and not as to its dangerous character. I draw attention to the fact, which is, I think, very noticeable, that there is not one single witness who voluntarily testifies to a defect in this structure by reason of it not being fenced. In every instance the learned counsel for the plaintiff had to ask a leading question and draw the witness' attention to it to get it out; and I must say that I am not as a rule very much impressed with testimony that is brought out in that way. It seems to me that where testimony is of a character most essential to prove the case for the party for whom a witness is called—probably the most essential—it is very suspicious that in order to get it out counsel has practically to put the testimony in the mouth of the witness.

I will just bring my own experience and knowledge into this case. I have seen railroad crossings in all directions over

this country and I cannot call to mind one single instance where an approach to the railroad (whether it is overhead, by subway or on the level) has been fenced. I have seen fences at the sides of highways leading up to cattle-guards, but wherever the approach has been higher than the level of the surrounding ground these fences have been in the ditch. I do not mean to say that that would be any answer to an action where the company was bound to fence by statutory provision and did not do so and an accident occurred by reason of such omission, but it makes me doubt whether under such circumstances there would be negligence at common law. Then take the narrowness of the approach, there are many ways built on road allowances through sloughs, not as wide as the approach to this railroad was; horses are liable to shy on those places, conveyances to be precipitated down the dump and serious accidents occasioned. Would any person or authority be liable for damages under such circumstances?

It was urged, however, at the argument, by counsel for the plaintiff, that the fact that Parliament had legislated with respect to highways, providing for the construction of fences along approaches to railway crossings on such highways of the character of the approach in this case, was sufficient to apprise the defendants that without such fencing the approach was dangerous. I was very much struck with this argument. I am satisfied that, taking the width of the approach, the height of it above the ditch and the fact that it was not fenced, it was a dangerous crossing, and with this, and in view of the legislation by Parliament to which I have referred, I have with great hesitation arrived at the conclusion that the defendants ought to have been aware of the dangerous character of this structure and are, therefore, liable for negligence at common law apart from the statute.

PRENDERGAST, J., concurred.

JOHNSTONE, J.:—This is an appeal by the plaintiff from the judgment of Newlands, J., in the Court below in favour of the defendant company. The defendant company,

in the summer of 1905, constructed on their own lands a railway crossing with approaches extending from Railway Avenue on the south, one hundred and fifty feet or thereabouts, to the track, and some distance north of the track. The Government road allowance running north and south across the line of railway is something like four hundred yards east of the crossing referred to. This highway seems never to have been in use as a crossing, but the public for years passed over on the company's lands at a point where the station now stands. The company, some years prior to 1905, having located its yard at the point of intersection of the railway line and the highway, rendered the crossing there dangerous and impassable owing to the number of tracks placed across the highway. In the summer of 1905, the company requiring the lands, over which the crossing then in use by the public, for station purposes, constructed the crossing complained of and erected thereon the usual sign "Railway Crossing" and this crossing has been in actual use and is the only one which could since be used by the public with any degree of safety.

The plaintiff, who resides north of McLean some five miles, had occasion to go to McLean on the 19th of February, 1906, and in so doing crossed the track in the usual way, returning home about six o'clock in the evening. Her team attached to bob-sleighs, having thereon a wagon box in which the plaintiff sat, was being driven by her son on and along the crossing from south to north, and when within about twelve yards of the track one of the horses shied towards the east side of the approach, the checking of the horses by the driver causing the sleighs to swerve around and to go over the embankment when the sleighs turned over upon the plaintiff and she became injured to such an extent that she had not fully recovered from the effects of the accident at the time of the trial.

The plaintiff in her amended statement of claim, sets out in paragraphs 5 and 6 that it was the duty of the defendant company to construct and maintain a safe and proper crossing over their track at such point (McLean) and to construct and

maintain proper and lawful approaches to said crossing, that by reason of negligence on the part of the defendant company in not constructing the said approaches in a lawful and proper manner and by reason of the defendant company's negligence in not providing and maintaining a good and sufficient fence on the sides thereof, the plaintiff, on the 19th day of February, 1906, in lawfully attempting to cross the said railway with her team of horses, was upset over the side of one of the said unfenced and unlawfully constructed approaches and sustained thereby great bodily injuries.

The defendant company in seeking to be relieved from liability contend there was no dedication of the crossing express or implied or by way of estoppel or otherwise and if what they did amounted to dedication the company were not bound to fence nor were they called upon to repair, that the plaintiff was guilty of contributory negligence and if she had a right of action this was lost to her—this suit not having been brought within six months from the accident.

At the trial evidence was adduced to prove and which did prove to my mind defective construction and the dangerous condition of the crossing by reason of want of uniform width, the sloping or crowned top, and the total absence of fences on either side of the approaches. Bird, the son, stated that the south approach commenced about fifty-two yards south of the track and that from this distance north the grade gradually increased up to the track where it was about eight feet above the street level and that at the place where the accident happened the approach was twelve feet wide at the top of an embankment nine to ten feet high, that there was no room there for two teams to pass, that he had personally experienced considerable difficulty in crossing in this respect, that the embankment or approach on the top was not level but rounded, that there were no fences on either side. Carrol, another witness, also swore that the approach was too narrow for teams to pass, that it was not fenced, and that a fence properly constructed would have prevented horses from shying off the grade and would have made

the crossing safer. Thos. Rollins thought the approach too narrow and that if there had been a fence the horses and sleighs could not have gone over. This witness also said he himself had been pitched off over the same embankment.

From this it seems clear the crossing was not a safe one by any means and that the accident was primarily caused for want of a level top on the embankment or proper fences on the side thereof.

It is admitted that the crossing in question was constructed by the defendant company and intended for the public use and that it was used by the public and that it was not so constructed by leave of the Board of Railway Commissioners nor was it ever accepted as a highway by the officers of the municipality.

The crossing was constructed by the company for the use of the public, was accepted and used by the public as such and that on the invitation of the company.

Considerable time was taken up by counsel with arguments *pro* and *con* of the question of whether or not the doctrine of dedication, express or implied, applied. I do not think it necessary to consider the case from this point of view as the liability of the company can be considered and determined without reference to the law of dedication or the provisions of the Railway Act regarding crossings.

As early as 1815 the question of liability under somewhat similar conditions arose. This occurred in *Rex v. Kerrison* (1815), 3 M. & S. 526, 16 R.R. 342, and the law was there laid down by Lord Ellenborough as follows: "The undertakers of this navigation have a duty, as it seems to me, arising out of the execution of their own powers under the Act. The Act enables them to cut new channels as occasion should require; and if occasion requires them to cut through a public highway, their duty is to furnish a substitute to the public by means of a bridge. Can we put any other construction upon the Act but this, that the legislature intended that so far as regarded the making the river navigable, and the cutting new channels for that purpose, neither public nor private rights should stand in

their way, but still they should make good to the public in another shape the means of passage over such ways as they were empowered to cut through. What has been done is not a mere incommoding the passage, leaving the public a partial enjoyment of the highway, but it is total deprivation of the means of using it."

Toms v. The Corporation of the Township of Whitby (1874), 35 U.C.R. 195, in appeal, 37 U.C.R. 100, is the leading case in Ontario bearing on the question and the authority of this case has been referred to with approval in numerous subsequent cases.

In the *Toms* case, Wilson, J., goes very exhaustively into the question of the liability of companies and municipalities to construct and maintain.

The first count of the statement of claim in the *Toms* case charged it there to be the duty of the defendant company to have placed proper guards and railings along the sides of approaches constructed by them to be used as a highway so as to render the highway safe. After reviewing a host of authorities Wilson, J., said at page 209: "Railway companies have been held bound to protect their engines from emitting sparks which were likely to produce injury so far as injury could from such cause be guarded against. It required no enactment to impose this liability, it arose from the reasonableness and necessity of the case": *Pigott v. The E. Counties R.W. Co.* (1846), 3 C.B. 229, 15 L.J.C.P. 235, was referred to and on the same page he added: "I am of opinion then if a guard or fence were necessary to make this road safe for the public use that it was the duty of the defendants to furnish such protection and if they did not do so and damage has resulted therefrom that they are liable civilly in an action for the injury sustained."

In *Oliver v. The N. E. R. Co.* (1874), L.R. 9 Q.B. 409, 43 L.J.Q.B. 198, the defendant's railway line had been constructed before any of their special Acts of Parliament had been passed and it was contended on behalf of the company that it was not part of the duty of the defendant company to keep in repair a

crossing erected by them across the highway. Cockburn, C.J., in delivering judgment stated: "The principles of the case of *Rex v. Kerrison*, and the other cases cited, clearly applies to this case."

In Manitoba, the Court of Queen's Bench in *Moggy v. Canadian Pacific Ry. Co.*, adopted the same principle. Taylor, J., delivered the judgment of the Court (8 Man. R. 209) : *Rex v. Kerrison* is there mentioned and followed as is also *Oliver v. The N. E. Ry. Co.*, and *The People v. N. Y. C. & H. E. R. Co.*, 74 N.Y. 302, referred to with approval. In the latter case the liability to construct approaches was discussed and the Court held that it was the duty of the defendants not only to properly make approaches, but to keep them in suitable repair. Having taken possession of the old highway and substituted a new one and different one they must preserve it in a state as far as practicable of original usefulness.

In referring to this decision, Mr. Justice Taylor comments on it as follows: "We consider the Supreme Court of New York to have correctly expressed the law, and that where a railway company has crossed a highway, the duty of the company is not merely to provide a crossing upon which the rails do not rise more than an inch above, or sink an inch below the level, but also to construct and maintain such approaches at each side as may be necessary to enable persons using the highway to avail themselves of the crossing. It is only where they have done that that they can be said to have restored the highway to its former state, or to such state as not to impair its usefulness." In speaking of the crossing in *Moggy v. C. P. R.*, the same learned Judge remarks: "As to the width of a crossing, it would be difficult to lay down any positive rules for a country so sparsely settled as this, but the company here having made a crossing of plank 14 feet, we think they should have provided for the grading of the approaches being the same width and not have left them sloping off at each side of the grading within that width."

In *Hanson v. C.P.R. Co.* (1906), 4 W.L.R. 385, a decision of

the Supreme Court of the North-West Territories, page 388, the following statement of the law under discussion as applied to that case will be found. "Moreover the company had built this sloping platform and sidewalk for the purpose of enabling persons coming to and going from the station to pass to and fro thereon; in other words, they invited that portion of the public to do so, and under those circumstances, where there was any danger such as I have stated, it was their duty, apart from any statutory enactment, to take reasonable steps to prevent accidents occurring. In *Smith v. Niagara and St. Catharines R.W. Co.* (1905), 9 O.L.R. 158, 160, Street, J., who delivered the judgment of the majority of the Court, lays down the following: 'The cases seem to have established that apart from that section (the 256th section of the Railway Act of 1888) and in cases in which it is not applicable, a duty is cast upon the defendants to take reasonable precautions at dangerous points for the avoidance of accidents.' "

Elliott on Roads and Streets gives the law at page 659 as follows: "When a road or street is opened and public travel is invited thereon, it must be made reasonably safe for such travel." At page 842: "Where the corporation is given power to construct its crossings in such a manner as may be essential to the convenient transaction of its business, it may, it has been held, change the grade or surface of the highway, if necessary, provided the crossing be kept in good repair and convenient for travellers. But this rule can not, as we believe, be so extended as to authorize a railroad corporation to so construct grades as to endanger the lives of citizens. The right to cross a highway does not authorize an appropriation of any part of it, nor a material interference with the public travel, and the duty to restore the highway and to erect and maintain the necessary structures required to make it reasonably safe and convenient, is a continuing duty, incumbent upon the company without any express statutory requirement. . . . The obligation to maintain the crossing generally begins as soon as the railroad is located over it. This duty usually extends only to lawful high-

ways, but if the company has made a crossing public by its own invitation or license, it is generally required to keep it in repair. . . . Railway companies must so construct and maintain their premises which abut upon highways and their tracks which run along or across highways that they shall not cause injury to travellers who are lawfully and properly using such highways, and if a company is negligent in this respect it will be liable to a traveller who, while exercising due care on his part, is injured by such negligence." Numerous American cases are cited by the authors as authority for this statement of the law. The same authors in the work on Railroads, at page 1668, say: "Something must be done to make the highway safe for travel, and the duty, as a rule, rests upon the railway company to make such changes and to erect such structures as will make the highway safe to use. The railway company must erect and maintain such structures as are reasonably necessary to enable the traveller to get on, over and off the crossing in safety. Proper approaches and embankments necessary to enable the traveller to reach and leave the crossing are a part of the crossing and the railway company must construct and maintain them." At 1794 it is stated that: "Where a railway company, whose duty it is to restore and keep in repair a highway crossing, negligently fails to perform that duty it will be liable to a traveller upon the highway who, in the exercise of due care, is injured thereby." It has also been held that: "If it constructs a crossing at a point where all the travel is, although not the true line of the highway as established, it is liable for a defect in such crossing the same as if it were on the true line of the highway." These propositions are supported by *Moberly v. Kansas City Ry. Co.*, 98 Mo. 183; *Moggy v. C. P. R.*, 3 Man. R. 209; *Collier v. Georgia R.W. Co.*, 76 Ga. 611.

In the judgment appealed from reference is made by the learned trial Judge to that part of the decision of the Board of Railway Commissioners in *Re Read and The Canada Atlantic Railway Company*, 4 Can. Ry. Cas. 272, where it was laid down that: "No Court or authority other than the Board can

make it lawful for either the railway company or any other body to construct highways to cross the line of railway." This statement is doubtless true, but has to my mind little or no bearing on the question of liability of a railway company under circumstances like these under discussion. In my opinion, the company was bound to construct such a crossing as would render it reasonably safe for persons to ride and drive over same and having acted as they did in constructing a defective and insufficient crossing and inviting the public to use it in this condition, they must be held liable irrespective of the Railway Act and whether or not said construction was authorized or was unlawfully constructed . . . using the word "unlawfully" in the sense in which the word "lawful" was intended in *Re Reid*. It is not open now to the company to say the crossing was unlawfully constructed.

As to the question, did the injury arise from the defective state of the crossing as the proximate cause or was the proximate cause the action of the horses? I think the answer to this question should be the proximate cause of the damage as against the defendants was the defective state of the approaches on the crossing. The case of *Toms v. The Township of Whitby*, 35 U.C.R. 195, in appeal, 37 U.C.R. 100, is an authority in favour of this proposition. Wilson, J., at page 219 of the report after a lengthy review of cases expressed his conclusion in the words: "The defendants, I think, are directly liable for the injuries done because it did happen by reason of the defective state of the road, and that was the direct, immediate, and proximate cause of the damage." At page 224: "But for the defective state of the road, the damage now complained of would never have happened, and there is in this case no other culpable act to which it can be attributed." Richards, C.J., at page 226 remarks: "The mere fact that the horse was restive and broke the waggon, or was, for the time being, not under control of the driver, cannot relieve the defendants from their responsibility. One of the very objects of the guards to a bridge is to prevent just such accidents, and

when they occur and injury is sustained in consequence of the omission of the corporation to keep the bridge in a reasonably proper state of repair, I fail to see how they can free themselves from liability unless they can shew that the party complaining has been guilty of want of reasonable skill or care in driving. The mere fact that the horse *shied*, as it is termed, does not imply want of care or skill in driving." In appeal the learned Chief Justice of the Court of Appeal expressed his opinion at page 104 that the defendants had "contrary to their duty in that behalf, neglected to maintain the *locus in quo* in a proper state and condition so as to protect travellers who had occasion to use the highway from danger of a serious character. . . . The defendants' duty was not only to erect but to maintain . . . I am of opinion that the facts proved warrant the conclusion that the accident arose from the negligence of the defendants in permitting the railing which had been erected along the line of the embankment to become useless for want of necessary repairs; that the horse backing was a casualty not attributable to want of reasonable care and skill in driving, and would not have resulted in any injurious result if the embankment had been properly fenced." Burton and Patterson, JJ., the other Judges of the Court of Appeal, were of the same opinion.

In *Foley v. Township of East Flamborough*, 26 A.R., Osler, J.A., quoting *Sherwood v. City of Hamilton*, 37 U.C.R. 410, and *Toms v. Township of Whitby*, *supra*, says at pages 45 and 46: "I do not regard the fact that the horses were running away at the time of the accident as by any means a conclusive answer to the plaintiff's right to recover. Their driver was still endeavouring to control them, and both he and the deceased were travellers on the highway. It may be well that Sullivan could not recover if it was his fault that the horses were not under control, but assuming that he was not negligent and was suing for his own loss, the question would be whether that loss would have been sustained but for the defect in the way. I think *Sherwood v. City of Hamilton* (1875), 37 U.C.R. 410, a well-decided case and it as well as *Toms v. Township of Whitby*

(1875), in the same volume, in appeal, p. 100, support that conclusion. So long as the driver is trying to manage and recover control of his horses which are carrying him over the road, I think he has the right to complain if by reason of a defect in the road he sustains an injury while he is in that situation. I do not see that it matters that he has lost control over his horses for one minute or for five, or why the existence of the defect may not properly be held to be the proximate cause in the one case quite as much as in the other. In both it was a natural and probable result of the defendants' neglect to repair the road that such an accident should happen at the place in question, whether at the moment of passing it the horses were under control or not." This learned Judge refers also to *Town of Prescott v. Connell* (1894), 22 S.C.R. 147; *Englehart v. Farrant* (1897), 1 Q.B. 240, 66 L.J.Q.B. 122, in support of the proposition that the defect in the road was the proximate cause of an effective cause of the accident, in other words "a cause of which the accident was a sufficiently natural and to be looked for consequence."

As to the contention of the defendant company that the action was not commenced within six months after the injury complained of, I agree with the judgment in this respect of Clement, J., in *Northern Counties v. C.P.R.*, 13 B.C.R. 130.

The injury suffered by the plaintiff does not seem to me to have been of a serious nature. It was thought unnecessary after one visit of the physician to require his further attendance and the plaintiff some time after in making a demand on the company claimed \$500 and I think \$300 a sufficient sum to award her.

I am therefore of opinion this appeal should be allowed and the judgment of the Court below in favour of the defendant company reversed and judgment ordered to be entered for the plaintiff for \$300 damages with costs of the action and of this appeal.

Appeal allowed.

Reversing this case reported at 7 Can. Ry. Cas. 195.

DEMURRAGE—CONTRACT OF CARRIAGE.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.

WALLACEBURG SUGAR CO. v. CANADIAN CAR SERVICE BUREAU.

(Average Demurrage Case, No. 4223.)

Railway companies—Demurrage—Quick release of cars—Small and large dealers—Contract of carriage—Canadian Car Service Rules—Reasonable despatch—Credit for free time—Public interest.

The Wallaceburg Sugar Company applied to the Board for an order directing the railway companies to establish what is generally known as an Average Demurrage Plan.

Under the Canadian Car Service Rules (framed for the quick release of cars rather than the collection of demurrage) of the Canadian Car Service Bureau, to whose rules Canadian and foreign railway companies operating in Canada conform, 48 hours free time are allowed to dealers for the unloading of cars, for an additional time \$1.00 per car per day is charged unless on account of the number of cars tendered to the dealer being unreasonable or the inclemency of the weather preventing unloading with reasonable despatch, an extension of free time is justified and allowed.

By the establishment of the Average Demurrage Plan the dealer would get credit on future shipments of the free time he had saved under the 48 hours previously and could hold such shipments in cars without any demurrage charge until the time credited to him had expired.

Held, 1. That in the public interest the application should be dismissed; 48 hours under ordinary circumstances being sufficient time for unloading cars.

2. That the contract of carriage is, that the car containing the goods after reaching the point of destination shall be released and unloaded with all reasonable despatch, not to exceed 48 hours in the case under consideration.

3. The penalty of \$1.00 per day for extra time makes the dealer prompt in releasing cars and thus increases the supply of them for the shipping public, while the Average Demurrage Plan might make a dealer dilatory in unloading so long as he had free time to his credit.

4. Each car, under the Car Service Rules being dealt with by itself, insures equal treatment between the smaller and larger dealer, but if the Average Demurrage Plan were in force it would give preference and advantage to the dealer with a large number of cars to unload and with a large capacity for storage.

The application was heard at Toronto on the 28th day of January, 1909.

A. D. Gordon, general manager for the Wallaceburg Sugar Company.

E. W. Beatty, for the Canadian Pacific Ry. Co.

W. H. Biggar, K.C., for the Grand Trunk Ry. Co.

The facts of the case are fully set out in the judgment of the Assistant Chief Commissioner.

February 4, 1909. THE ASSISTANT CHIEF COMMISSIONER:—The Average Demurrage Plan, which the applicant seeks to have established, is one under which a railway company grants a credit of free time to a consignee, when he unloads a car in a shorter time than the maximum provided in the Car Service Rules; which credit, or spare time, is set off against excess time, for the use of other cars for which the railway company now charge the consignee demurrage.

At the hearing of this case, it was urged by the applicant that as the average system existed in the State of Michigan, where some of its competitors were, that it should be adopted in Canada, at least in so far as the sugar refiners were concerned. It was also stated that the Michigan refiners were able to purchase their raw material in Canada, but the Canadian refiners were denied the privilege of purchasing in Michigan; that the American manufacturer was protected by a duty of \$1.77 per hundred pounds, while the protection granted the Canadian manufacturer was but 83 cents, and that therefore some special consideration should be granted the applicant. I cannot see how the fairness or the justice of the system upon which charges for car service in Canada are made, is affected by these conditions which surround the sugar refiners of this country, or why, because such conditions exist, a radical change in the system should be made.

Mr. Gordon, the general manager of the Wallaceburg Company, told us that while they can regulate the number of cars of beets ordered per day from the farmers, they cannot control

the number of cars per day which the railway companies may deliver, and that, as a result, they are sometimes "swampt." He said that, on an average, they unloaded 22 cars per day during the past year, but have unloaded as many as 90 cars in a day. About 60 per cent. of the beets consumed at the refinery are hauled by rail; the haulage of the other 40 per cent. being about equally divided between water transports and teams.

That the company is capable of handling a fair number of cars within the time allotted by the Canadian Car Service Rules, is quite apparent from the statement submitted with its application, dated November 11th, 1908. It shews that during a certain period 1,051 cars were unloaded, and that the average time per car was $31\frac{1}{2}$ hours. Of this number of cars, 855 were not held longer than the 48 hours free time allowed for unloading under the Car Service Rules. This proves that, under ordinary circumstances, 48 hours is sufficient time to be allowed for unloading a car of beets.

If special circumstances occur, for which the consignee is not responsible, which prevent him from unloading the cars delivered within the allowed free time, the Car Service Rules provide that demurrage shall not be charged for necessary additional time. For instance, allowance of extra time is made when cars are tendered to the consignee under conditions for which the railway company is responsible in numbers beyond his ascertained reasonable ability to unload, or where the weather is inclement and unsuitable for unloading. These rules are interpreted, not by the railway company interested, but by the Canadian Car Service Bureau, whose manager, Mr. Duval, stated, under oath, that the rules are interpreted most liberally to the consignee, and that the object of the Bureau was to secure the quick release of cars, rather than the collection of demurrage for the railways.

This can be well understood even from the railway point of view, because while the car is held the company can only get \$1.00 per day for it, whereas the earning capacity of a freight car in service is about three times that amount.

The "average system" suggested, in my opinion, is not justifiable under the contractual relations which exist between the consignor or consignee (as the case may be) and the railway company. The contract of carriage is, that the railway company will carry the goods to the point where they are to be delivered to the consignee, who in turn is to unload and release the car with all reasonable despatch. For more certainty and uniformity of practice, rules have been adopted, which say in effect that "reasonable despatch" for unloading shall not, in the case under consideration, exceed 48 hours. If a man exceeds this reasonable time in unloading, he is penalized by a charge of \$1.00 per day for the extra time he may hold the car. Such a provision is in the public interest, because it makes a consignee prompt in releasing cars consigned to him, and thus increases the supply of available cars for the shipping public.

In my opinion the "average system" might have the effect of making a consignee dilatory about unloading so long as he had free time to his credit, and if he had not free time to his credit, the circumstances would be the same as they are under the present rules.

The Canadian Car Service Rules have only been in force since March 1st, 1906, and it has taken some time to get the public to understand them. They may be defective in some details and require to be amended, but I think they are founded on sound principles which should not be departed from.

The uncontradicted evidence of Mr. Duval, of the Car Service Bureau, to the effect that cars are being released more quickly by consignees under these rules than was done formerly, proves that the desired result is being accomplished.

The intention is that, under the Car Service Rules, each car shall be dealt with by itself and without reference to the movements of other cars. This insures equal treatment of the smaller shipper or consignee with the larger one. But, if the "average plan" were in force, I can well see that an injustice would be done the small dealer by giving an advantage or preference to

the dealer who had a large number of cars to unload. Suppose a dealer with a large capacity for storage received 50 cars of merchandise which, under the rules, he had two days to unload, and unloaded them all the first day. He would then have 50 days to his credit. The next day, he and a small competitor each received one car. The small competitor would have to unload in two days or be penalized, while the other could hold his car for fifty days free time, which might prove to be of very material advantage. It may be said that this is an extreme case. It doubtless is, but it shews how the Average Demurrage Plan might work out unless there were limitations upon it. Mr. Gordon suggested that the plan might be adopted for those in his line of business only. I do not think it would be advisable at this early date to start making exceptions to the general principles laid down in the car service order, which has not yet been in effect for three years. These principles are, in my opinion, sound, and should not be interfered with. I am, therefore, of opinion that this application should be dismissed.

If the applicant cannot get redress under the rules from the Car Service Bureau, he may apply to this Board, and his complaint will be heard.

DEMURRAGE—EXTENSION OF FREE TIME.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.]

MCDIARMID & GALL V. GRAND TRUNK AND CANADIAN PACIFIC
RY. COS.

(No. 1099.)

*Demurrage—Free time—Extension—Unreasonableness of two-day limit—
Weather conditions—Onus of proof.*

The applicants applied to the Board to extend the free time for unloading charcoal from two to three days.

Held, 1. That the applicants have failed to shew that the time limit of two days is not sufficient under ordinary circumstances and the onus of establishing the unreasonableness of the two-day limit is upon them.

2. Railway companies now allow additional free time when the weather conditions are unfavourable for unloading expeditiously.

3. The application must fail, the time limit of two days being sufficient.

THE application was heard at Montreal on the 22nd day of December, 1908.

F. W. Hubbard, K.C., for the applicants.

M. K. Cowan, K.C., for the Grand Trunk Ry. Co.

E. W. Beatty, for the Canadian Pacific Ry. Co.

The facts of the case are fully set out in the judgment of the Chief Commissioner.

April 15, 1909. THE CHIEF COMMISSIONER:—The car service rules provide for two days (48 hours) for the unloading of charcoal, and the applicants ask that this free time be extended to three days (72 hours). They receive shipments at Mile End, and at Ogilvie's Siding, the latter in the west end of Montreal; and from statements filed covering a certain period ending October 31st last, they had received at Mile End 120 cars, upon 83 of

which they had been compelled to pay demurrage; and at the west end siding 82 cars, upon 53 of which they had paid demurrage, so it would seem that for some reason demurrage is paid upon a large percentage of cars.

It was contended for the railway companies that the cause of the delay was that the applicants bagged the charcoal in the cars and delivered it direct to their customers, thus making use of the car as a storehouse while delivery was being made to the customers. This custom does not obtain at the Mile End delivery point; the applicants have a warehouse there, and they say they have never made any delivery to customers from the cars at that point, yet about 60 per cent. of the cars unloaded there carry demurrage charges.

These rules covering free time were only adopted after full and careful consideration, and I do not think they should be broken in upon unless a case for so doing is clearly established.

It was contended by the applicants that the same free time should be given for charcoal as for coal or coke, but I think the difference in the commodities, the mode of hauling, weight, etc., justifies the difference in time.

The burden of shewing the two-day limit to be unreasonable is upon the applicants; there are a number of other dealers in charcoal in Montreal and elsewhere and no complaints have been made by them of the present free time limit. The companies shewed the length of time required by at least one other dealer in Montreal to unload, from which it would appear that the present limit was sufficient.

One of the reasons given by Mr. McDiarmid for desiring longer time was, "If there is a wet day or part of a wet day," it caused demurrage liability. This is covered by rule 6 which calls for additional time allowance if the weather is wet or inclement, or other local conditions render unloading impracticable during business hours.

It is not entirely clear that some additional time might not have been given upon this commodity when these rules were

being formed; but as the onus of establishing the unreasonableness of the two-day limit is upon the applicants, and there has been no general complaint, I think the application fails.

The Assistant and Deputy Chief Commissioners agree with the Chief Commissioner.

UNJUST DISCRIMINATION—FREIGHT RATES.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.

RIDEAU LUMBER CO. ET AL. V. GRAND TRUNK AND CANADIAN
PACIFIC RY. COS.

(No. 980.)

Freight rates—Short and long poles—Lumber—Special contract—Unjust discrimination—Special, local and joint tariffs—Carriage in more than one car—Higher and export rates.

On a complaint to the Board of unjust discrimination between the rates on telegraph, telephone and trolley poles and those on lumber and other forest products.

Held, 1. That the rates charged on poles loaded on one car shall not be greater than those on common lumber as provided in the special, local and joint tariffs of the railway companies.

2. That on poles so long as to require more than one car for their carriage the railways be authorized to charge 20 per cent. higher than for one car.

3. That poles may be exported by Canadian railway companies with the concurrence of their United States connections under joint rail rates for general traffic at the lumber classification.

Scobell v. Kingston & Pembroke R.W. Co., 3 Can. Ry. Cas. 412, referred to.

THE application was heard at Ottawa on the 7th of October, 1908.

J. Greene, for the Rideau Lumber Co. *et al.*

M. K. Cowan, K.C., for the Grand Trunk Ry. Co.

E. W. Beatty, for the Canadian Pacific Ry. Co.

The facts of the case are fully set out in the report of the Chief Traffic Officer contained in the judgment of the Chief Commissioner.

March 25, 1909. THE CHIEF COMMISSIONER :—Mr. Hardwell reports in this matter as follows:—

Complaint of John McKenzie, of Ormsby, J. A. Scobell, of Kingston, Rideau Lumber Co., of Ottawa, and others, that the freight rates charged by railway companies on telegraph, telephone and trolley poles are unjustly discriminatory with respect to the rates charged on lumber and other forest products.

Prior to the issue of the order of the Board, dated July 30th, 1904, *Scobell v. Kingston & Pembroke Railway Co.*, telegraph poles were not rated in the Canadian Freight Classification, but were specified for carriage by special contract only. By that order wooden telegraph, telephone and trolley poles were added to the list of commodities which are included in the Canadian classification under the heading of "lumber." The classification now reads as follows:—

Logs, masts, piles, spars, telegraph,
telephone and trolley poles, timber
and traverses L.C.L. 4. C.L. 10

Under the classification, the minimum carload weight for 10th class traffic is 30,000 lbs. per car of not over 36 feet 6 in. inside or platform length, and that is the minimum charged for short poles on single cars; on long poles Rule 1 (c) provides that long poles requiring two or more cars for carriage are charged the 10th class minimum of 30,000 lbs. for the first car, and two-thirds of the classification minimum, or 20,000 lbs. for each additional car over which the poles extend.

That order did not mean that the companies were to charge 10th class rates and none other on poles, any more than on lumber and other forest products which are generally carried at commodity rates; the intention was to abolish the special contract privilege as tending to variation and discrimination. Whether or not, as a result of that order, taken in connection with the remark of the Chief Commissioner in the judgment that "the second ground of complaint that the respondent company's rates upon telegraph, telephone and trolley poles are excessive rates in

that they are higher than the rates on ordinary lumber, etc., the Board is not satisfied that this matter of complaint has been fully and sufficiently argued before us," the companies, in the following November, issued new tariffs on forest products, in which the ordinary 10th class rates, under the Canadian classification, were substituted for the special mileage scale which had previously been in force. That old mileage scale, applicable, by the way, between the stations of one company only, made the rates on telegraph, telephone, and trolley poles 20 per cent. higher than the rates on common lumber; also, under that scale, the minimum weights for long poles requiring two or more cars were 30,000 lbs. on the first car, or the same as for single cars, and 20,000 lbs. for each additional car, so that the carload minimum weights then were practically the same as they are now.

It was stated at the hearing by Superintendent Donaldson of the Grand Trunk, that on his division (the old Canada Atlantic and O. A. & P. S.), the pole shipments numbered probably 1,500 cars a year, and that about 85 per cent. were short poles carried on single cars. It also appeared from the evidence that the risks of transportation which the companies considered entitled them to higher rates on poles than on lumber pertained to the long poles rather than to the short ones. These risks, however, seemed to be attributable very largely to the lack of inspection and the non-observance of the rules of the Master Car Builders' Association governing the loading of lumber, logs, poles, etc., on open cars, known as the "M. C.B." Rules, No. 30 of which reads as follows:—

"All material carried on two or three cars must always be examined by a competent inspector before the cars are moved from the loading point. If an inspector is not stationed at the loading point, the agent must give notice to the proper authority when the cars are loaded, so that proper inspection may be arranged for. The object of such inspection is to see that these regulations have been complied with."

The M. C. B. Rules give detailed instructions as to the loading of logs, poles, etc., the size of stakes, tie wires, etc., and are accompanied by explanatory diagrams, and if these rules are strictly complied with, there would seem to be no reason why telegraph poles, under ordinary conditions, should not be safely carried. Similar risks are incurred with respect to improperly staked lumber, and the evidence seemed to me to prove that the difficulties complained of should be preventable by rigid inspection rather than by the imposition of higher rates. Whether the rate be low or high, the risk exists—possibly the higher the rate the greater the risk, as shippers would probably be inclined to greater carelessness on the theory that they were paying the companies well for any extra duties thrown upon them.

It was also stated, as a reason for the higher rates, that empty cars had often to be hauled considerable distances for loads, whereas box cars may be immediately available for lumber shipments; but this same empty movement of flat cars is frequently necessary in the case of lumber and machinery shipments, racked cars for bark, flats for logs or square timber, etc.

As regards the practice elsewhere; the Canadian Pacific carries both long and short poles on its main and branch lines in British Columbia, at the same rates as charged for lumber, but the minimum carload weights are not so favourable as in the east. These minimums are somewhat variable, but in most cases the long poles are carried at a minimum of 30,000 lbs. for each car used. It is true that the rates in British Columbia are greater than in eastern Canada, but so also is the cost of haulage.

As the companies do not file their local tariffs with this Commission, I have not the means of knowing what the local rates of the companies operating in the United States may be, except in the case of the Michigan Central, whose local commodity tariff on lumber and forest products, G. F. D. No. 7576, effective July 7th, 1908, I have before me. This tariff applies between all stations on the Mackinaw Division and branches north of Bay City, Michigan, and it applies on telegraph and telephone poles,

as well as on lumber and the other forest products which are usually carried at lumber rates. The minimum weight is in accordance with the official classification, which provides a minimum of 34,000 lbs. for single cars, and only 50 per cent. (or 17,000 lbs.) for each additional car. The rates also are lower than charged by the same company between its stations in Canada, and by the other Canadian companies. I have examined a number of joint tariffs on forest products between two or more companies within the United States, and these cover telegraph poles also.

In my opinion, taking into consideration the fact that lumber rates are applied on short timber, logs, ties, fence posts and the like; the evidence and the practice elsewhere; the rates charged on short poles in eastern Canada are unjustly discriminatory with respect to the rates charged on other forest products loaded on single cars, and that the companies in eastern Canada should be required to carry wooden telegraph, telephone, electric light and trolley poles, on single cars, at the same local and joint rates as lumber, when not subject to uncontrollable competition; or, in the words of the order of the Board in the case of Gillies Bros. and the Rideau Lumber Co., dated August 1st, 1906, that the tolls "shall not be higher than the tolls provided in the special (local and joint) tariffs of the companies to apply on common lumber; except that it shall not be obligatory on the companies to charge thereon such tolls as may be made necessary by the competition of carriers not subject to the Railway Act when such competitive tolls are lower than the lowest special tariff of tolls between the same points on common lumber issued under ordinary transportation and trade conditions." I think, also, that the phraseology of that order should apply with respect to shipments of poles from points in Canada to points in the United States between which joint rail rates on general traffic are, or may be, made by the Canadian railway companies with the concurrence of their United States connections.

As regards poles too long for a single car and requiring more than one car for their carriage, I believe the companies are reasonably entitled to higher rates than for single cars, and I would

recommend that the scale used by the companies themselves prior to November, 1904, be prescribed, namely, 20 per cent. higher than for single cars, the minimum weights to be in accordance with Rule 1 (c) of the Canadian classification, and in the computation of the additional rate the fractions to be disposed of as follows, namely: .25 and under, nil; .26 to .75 = $\frac{1}{2}$ cent; .76 and over = 1 cent; the rates in no case to exceed the 10th class rates between the same points.

The impression I formed at the hearing was that, although there was some extra risk in the carriage of poles, yet that no reason existed why they could not be safely loaded if proper care were exercised.

I think an order should issue embodying the recommendations of the Chief Traffic Officer. The following order was made:—

Upon the hearing of this application, counsel for the applicants, the Canadian Pacific Railway Company, and the Grand Trunk Railway Company appearing at the hearing, the evidence adduced; and upon the report of the Chief Traffic Officer of the Board—

IT IS ORDERED:—

1. That the tolls and minimum carload weight charged by railway companies subject to the legislative authority of the Parliament of Canada and operating lines of railway in Canada east of Port Arthur, Ontario,—on wooden telegraph, telephone, electric light and trolley poles loaded on single cars, be not greater than the tolls and minimum carload weight provided in the special (local and joint) tariffs of the companies to apply on common lumber; except that it shall not be obligatory on the companies to charge thereon such tolls as may be made necessary by the competition of carriers not subject to the Railway Act, when such competitive tolls are lower than the lowest special tariff of tolls between the same points on common lumber issued under ordinary transportation and trade conditions.

2. That, with respect to poles too long for a single car and requiring more than one car for their carriage, the said com-

panies be authorized to charge not more than twenty per cent. higher than for single cars and not more than the 10th class rates, the minimum weight for the first car to be the same as herein prescribed for single cars, and for each additional car over which the load extends two-thirds of the single car minimum, the longest car in the series to be considered the first car.

3. That in the computation of the additional rate on long poles, the fractions be disposed of as follows, namely: .25 and under, nil; .26 to .75 = $\frac{1}{2}$ cent; .76 and over = 1 cent.

4. That the provisions of this order apply also to shipments of poles from points in Canada to points in the United States, between which joint rails rates for general traffic are, or may be, made by the Canadian railway companies with the concurrence of their United States connections; the minimum weights to be in accordance with Rule 7 of the so-called "official" classification, or as it may be modified by the joint tariffs, if any, on lumber between the same points, and the 6th class rates to be the maximum.

UNJUST DISCRIMINATION—CONTRACT.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.

ATTORNEY-GENERAL FOR BRITISH COLUMBIA V. CANADIAN PACIFIC
RY. CO.

(No. 1268.)

Contract—Construction—British Columbia—Dominion of Canada—Undue or unjust discrimination—Freight and passenger traffic—Reduced and higher tolls—Terms of Union—44 Vict. ch. 1, par. 22 (C.)—Railway Act, 1879, sec. 17, sub-secs. 6, 11—Railway Act, sec. 315.

The Attorney-General for British Columbia applied to the Board for an order directing the Canadian Pacific Railway Company on the ground of undue or unjust discrimination to reduce the tolls on freight and passenger traffic over the main line of railway in the Province and thus place it upon the same favourable conditions in respect to such tolls as are other portions of Canada.

The applicant contended that under the terms of union (see schedule to Imperial Order in Council Rev. Stat. British Columbia, pp. 105 *et seq.*, May 16th, 1871), whereby British Columbia entered Confederation, there was an implied contract that the railway company should charge no higher tolls in one section of territory than another through which the railway ran.

Held, 1. That the application must fail, the Board being unable to find any such contract expressed or implied, and there being no evidence of unreasonable rates or unjust discrimination.

2. That section 17, sub-sections 6 and 11 of the Railway Act of 1879, and section 315 of the Railway Act, allow different tolls to be charged in different localities where different circumstances exist justifying such treatment.

3. That the terms of the contract with the Dominion Government for the construction of the Canadian Pacific Railway, dated 21st October, 1880, schedule to 44 Vict. ch. 1, have nothing to do with freight and passenger tolls in British Columbia; the only party who could make any complaint as to their non-observance being the Government of Canada. *British Columbia Pacific Coast Cities v. Canadian Pacific Ry. Co.* (Vancouver Interior Rates Case, No. 104), 7 Can. Ry. Cas. 125, followed.

THE application was heard at Victoria on 1st March, 1909.

A. P. Luxton, K.C., for the applicant.

F. H. Chrysler, K.C., and J. E. McMullen, for the Canadian Pacific Ry. Co.

The facts of the case are fully set out in the judgment of the Chief Commissioner.

April 15, 1909. THE CHIEF COMMISSIONER:—This is an application made by His Majesty's Attorney-General of the Province

of British Columbia for an order placing the Province of British Columbia upon the same favourable condition in respect of tolls for freight and passenger traffic over the Canadian Pacific Railway through British Columbia, as are other portions of the Dominion of Canada over the main line of that railway; that the existing freight and passenger tolls over the railway be reduced; and that the railway company be restrained from charging other or higher rates within the Province of British Columbia than it charges in other parts of Canada.

The formal complaint and answer were filed with the Board after the case was argued, and the hearing took place upon a resolution of the Legislative Assembly of the Province of British Columbia which had been forwarded to the Board by the clerk of the Executive Council; the following is the resolution:—

“Whereas by section 11 of the Terms of Union, the Government of the Dominion undertook to secure the construction of a line of railway to connect the seaboard of British Columbia with the railway system of Canada.

“And whereas large areas of public lands belonging to the Province of British Columbia have been conveyed to the Dominion Government in furtherance of the said railway.

“And whereas the benefits to be derived from the construction of the said railway was one of the inducements which led to the union of British Columbia with the other Provinces of Canada, as well as for the conveyance to the Dominion Government of the public land of the province as aforesaid.

“And whereas the railway above referred to is national in its character, and as such has received a very large measure of assistance of public moneys and lands.

“And whereas it was not contemplated at the time of the union of British Columbia with the other provinces of Canada that there should be any discrimination in freight and passenger rates between one locality and other localities, or between one province and any other province. .

“And whereas numerous complaints have from time to time

been made by various Boards of Trade in British Columbia to the effect that existing freight rates discriminate against cities in British Columbia.

“And whereas the Board of Railway Commissioners have ordered a reduction in passenger rates to three cents per mile upon all railways between Calgary and the Atlantic.

“And whereas the passenger rates charged upon railways in British Columbia are in excess of three cents per mile.

“And whereas such excess is a discrimination detrimental to the best interests of British Columbia, as it tends to prevent development and the influx of population.

“Therefore, be it resolved, that an humble address be presented to His Honour the Lieutenant-Governor, praying that he will cause a full representation of the facts to be made to the Government of the Dominion and to the Board of Railway Commissioners, to the end that British Columbia may be placed in as favourable condition, in respect to freight and passenger rates, as are other portions of the Dominion.”

In addition to the matters covered by the resolution, the formal complaint alleges (par. 10) that the Canadian Pacific Railway, by their contract with the Dominion Government, agreed to construct the railway through British Columbia according to the standard of the Union Pacific Railway when it was first constructed (the grade of which later railway did not exceed 2%), and also agreed forever to efficiently maintain and operate the railway, and that it was in consideration of the due performance of this contract that the lands were granted and the subsidies given (par. 11). That the railway was not constructed according to the said standard, and the grades through the mountains far exceed 2% (par. 12). That the passenger rate in British Columbia is 4 cents per mile (par. 13); that the tolls charged unjustly discriminate against British Columbia (par. 14); that the spirit of the Canadian Pacific Railway Company's Act is not being carried out.

At the hearing, no evidence was given by the applicants, but

the history of the construction of the Canadian Pacific Railway, the various statutes and contracts bearing upon the same, the governmental aid in land and money, and other matters, were fully discussed, and counsel for the applicant put his claim for relief upon the ground that these statutes and agreements bound the company to charge no higher tolls in one section of territory than in another, through which the line that was the subject of the contract ran; in other words, that the company's tolls could not vary as the circumstances and conditions changed.

I have gone over the argument since the notes of hearing were transcribed, and have read all the enactments cited, and I am clearly of opinion that the contention of the applicant, in the broad way advanced, is not well founded. It matters not, for the purposes of considering this case, what the land and money grants to the company were; the extent or character of the government aid does not affect the contract that was arrived at, nor am I able to see how the position is in any way affected by the fact that the Government of British Columbia conveyed large areas of Provincial lands to the Government of the Dominion of Canada. The questions are what was the contract between the Government of Canada and the railway company? and, what was the general railway law at the time?

The agreement relating to the construction of the railway will be found as a schedule to 44 Vict. ch. 1, and only a few of its provisions bear upon this matter. Paragraph 22 provides that the Railway Act of 1879, so far as applicable and not inconsistent with the company's Act of Incorporation (schedule "A" to the contract), should apply to the Canadian Pacific Railway Company. The 17th section of the Railway Act of 1879 dealt with the tolls chargeable, and the 11th sub-section empowered the Parliament of Canada to, from time to time, reduce the tolls upon any railway, but not without the consent of the company, or as to produce less than 15% per annum on the capital actually expended in its construction; nor unless on an examination by the Minister of Public Works of the amount received and expended by the company, the net income from all sources, for the year then last

past, is found to have exceeded 15% upon the capital actually expended.

Section 20 of the company's Act of Incorporation provides that the limit to the reduction of tolls by Parliament, as provided in section 17 above referred to, shall be extended so that such reduction may be to such an extent that such tolls, when reduced, shall not produce less than 10% profit on the capital actually expended in the construction of the railway, instead of 15% profit. So far as appears, the above sections are the only ones in either the general Act or the Special Act, bearing upon the question of tolls; so both upon the company's contract with the Government of Canada and its Special Act, it was under the general Railway Act of 1879 upon the question of tolls, except as above indicated.

The present law bearing upon this part of the complaint will be found in section 315 of the Railway Act, which provides that all tolls shall always, under substantially similar circumstances and conditions, in respect to all traffic of the same description, and carried in or upon the like kind of cars, passing over the same portion of the line of railway, be charged equally to all persons, and at the same rate; and no toll shall be charged which unjustly discriminates between different localities.

It has been recognized by the Board since its establishment that the equality of tolls was required only where the circumstances and conditions were substantially similar.

The Railway Act of 1879 contained the following provision (sec. 17, sub-sec. 6) :—

“All or any of the tolls may, by any by-law, be reduced and again raised as often as deemed necessary for the interests of the undertaking; but the same tolls shall be payable at the same time and under the same circumstances upon all goods and by all persons, so that no undue advantage, privilege, or monopoly may be afforded to any person or class of persons by any by-laws relating to tolls.”

Nothing appears in the contract requiring the company to establish and maintain, over the whole main line of the railway

when completed, the same or similar tolls, under different circumstances; and so far as I can see the company was bound, under the above clause, to charge the same or similar tolls, at the same time and under the same circumstances only.

No clause appears in the Act of 1879 in express terms prohibiting unjust discrimination between different localities. I presume, however, a strict reading of the above sub-section would work the same result, so long as the circumstances were the same. It seems to me the company was at liberty, when the road was put into operation, to make distinctions in its tolls in different localities, where different circumstances existed that would justify such difference of treatment. The Railway Act as it now stands gives it and all other companies that privilege. This view of the law is adopted in the case of the *British Columbia Pacific Coast Cities v. Canadian Pacific Ry. Co.* (*Vancouver Interior Rates Case*, No. 104), 7 Can. Ry. Cas. 125, where the rates in British Columbia were attacked upon the ground of discrimination. The late Chief Commissioner in that case said:—

“It appears to me that no inference can be drawn from a mere comparison of distances upon different portions of railways, and that it does not constitute discrimination—much less unjust discrimination—for a railway company to charge higher rates for shorter distances over a line having small business, or expensive in construction, maintenance or operation, than over a line having larger business or comparatively inexpensive in construction, maintenance or operation. In my opinion, a party raising such a complaint upon a mere comparison of distances, should shew the nature of the particular lines referred to, and that there is a material disproportion of rates as against the shorter line, after due allowance is made for the circumstances just mentioned.”

With this I fully agree, and applying this doctrine to this case, the complainants would be required to establish that the rates in the Province of British Columbia, having regard to the nature of the lines there, the volume of business, cost of construction, maintenance, and operation, and other material matters, were out of joint with the rates over the company's lines in the provinces

to the East. No evidence upon these heads was offered, and the whole case was put as one of contract. I am unable to find any such contract, expressed or implied, and so far as this branch of the contention is concerned, I think it fails.

The argument, as put at the hearing, summarized, was the following:—

“That being a railway of national concern, having received large subsidies from the Dominion Government, the Dominion Government having received large subsidies from the province, it was the spirit and intention of all the parties, when that Act was passed, and when the railway was authorized to be built, that no higher rates should be charged through British Columbia than over any other part of the main line of the Canadian Pacific Railway.”

To ascertain the spirit and intention of the parties one can only look at the contract and the Acts bearing upon the matter; and, as stated, I am not able from these to find that the company prevented itself from increasing its tolls in localities where the circumstances justified it, and as permitted by the Railway Act of 1879.

It is alleged that it was not contemplated, at the time British Columbia came into Confederation, that there should be any discrimination in freight and passenger rates between one province and another. The answer to this is that if there is undue or unjust discrimination, it is illegal, and if proved will be dealt with as a violation of the law; but this cannot be inferred, it is a matter of evidence, having regard to different conditions and other matters above dealt with.

It was argued for the applicants that the company had violated its contract with the Government of Canada, dated October 21st, 1880, in that the road was not constructed up to the standard called for; that to save mileage it was located where heavy grades were necessary and expense of maintenance increased; and that the company should not be permitted to advance these as grounds for difference in rates, if this position was caused by reason of their not fulfilling their contract.

It was objected for the company that the applicants could not be heard to complain of any alleged breach, as the contract had not been made with the Government of British Columbia. Apart from whether such a contention is open to the applicants, as to which there is the gravest doubt, and apart also from any evidence that the contract was not fulfilled, and of which there was none, it appears that, by an agreement dated in November, 1886, and approved by Order in Council of November 2nd, 1886, made between the Department of Railways and Canals and the Canadian Pacific Railway Company, it is expressly stated that the road had been constructed and equipped of a quality and character equivalent upon the whole to the approximate standard agreed upon, namely, the Union Pacific Railway, as accepted by the Government of the United States, the railway being in many respects of superior quality and character to the approximate standard, and only in some degree inferior in respect of the gradients of a portion of the line in British Columbia, nine miles in length, passing Mount Stephen. The company covenanted in this document that it would, upon being so required by the government, make such alteration and improvement in the nine miles as should be prescribed by the government, not being in excess of the requirements of the government engineer, as shewn by the plans and specifications prepared by the company, and \$1,000,000, land grant bonds were deposited with the government to be held as security for the performance of this covenant, and to be used in such performance, if the company made default therein.

It appears perfectly clear that, in view of all this, the only party that could make any complaint would be the Government of Canada, and in any event I am unable to understand how the matter has anything to do with the question of the freight and passenger rates in British Columbia.

Upon the case as it stands it is impossible to afford any relief to the applicants. Request was made that the Board should cause an enquiry and have an account taken to ascertain if the earnings of the railway were such that the Board could reduce the rates,

in view of the section 20 above mentioned. This enquiry is not necessary, as the company admits that its rates are subject to reduction or adjustment by the Board, if a proper case is made out—jurisdiction was admitted in the *Coast Cities case* above cited and in several others.

If the applicant desires to give evidence for the purpose of establishing that, in view of all the circumstances, the rates now charged in British Columbia are unreasonably high, or that undue discrimination exists, leave for such purpose should be granted, otherwise, upon the record as it stands, the application fails.

CONSTRUCTION OF RAILWAY—DIVERSION OF HIGHWAY.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.

VANCOUVER, VICTORIA & EASTERN RY. & NAV. CO. v. MUNICIPALITY OF DELTA.

(No. 769.)

Construction of railway—Diversion of highway—Expropriation—Railway Act, sec. 178—Compensation—Landowners interested—Access to navigable river—Conditions—Foot crossings.

A railway company applied to the Board under section 178 of the Railway Act for authority to expropriate certain lands for the purpose of the diversion of a public highway.

The landowners interested opposed the application unless the following conditions were granted: (1) that the adjoining landowners be paid compensation for the lands (part of the public highway) on which the railway was to be built on the ground that the said lands would revert to them as a closed public highway, (2) that the company pay compensation to the owners of the land required for the diverted highway, (3) that the owners be given the right of crossing on foot and to maintain landings and net-houses on the company's right of way next the river opposite the lands of each owner.

Held, that the application should be granted, subject to the condition as to foot crossings.

THE application was heard at Ottawa on the 3rd day of December, 1907.

A. Haydon, for the Vancouver, Victoria & Eastern Ry. & Nav. Co.

J. A. Ritchie, for the property owners.

The facts of the case are fully set out in the judgment of the late Chief Commissioner, Hon. A. C. Killam.

December 26, 1907. THE CHIEF COMMISSIONER (HON. A. C. KILLAM):—In August last the Board made an order authorizing the Vancouver, Victoria & Eastern Railway and Navigation Company “to divert the Ladner highway along the Fraser river known as the River road in the said municipality of Delta, to the extent and in the manner shewn in pink as route No. 2 on the plan and profile on file with the Board, and to maintain, construct, and operate its railway along and upon the existing portions of the said highway between the points of diversion.”

On the 29th of October last the railway company applied to the Board, under section 178 of the Railway Act, to expropriate certain lands for the purpose of the diversion of the highway just mentioned under the Board’s order. The land sought to be taken was a strip coloured red on the plan accompanying the application, and was the land necessary for the highway along the route prescribed by the Board’s order. The company’s application stated “that by by-law dated the 12th day of November, 1906, the municipality of Delta gazetted a highway between the termini of the diverted highway and the land coloured red on the plan filed herein practically coincided with the said highway except where it is of a greater width than 66 feet and then only as to the excess and also where it crosses the ravine on lot 16, group 2.”

The application also alleged “that it is necessary, in order to construct the diverted highway in accordance with the order of the Board of Railway Commissioners for Canada, to take the whole of the land coloured red on the plans filed herein—where the land required is of a greater width than 66 feet the road crosses ravines or follows along steep hillsides, and the width

shewn is necessary in order to construct the said highway and for no other purpose."

A number of the parties whose property was thus sought to be taken filed answers stating merely that it was not necessary for the company to take the lands referred to in the application.

By consent of parties, the application came on for hearing at Ottawa, when the question of the necessity for taking the land coloured red on the plan was not raised; but counsel for a number of landowners requested that certain conditions be imposed upon the railway company.

By direction of the Board these conditions were put in writing and the railway company's counsel was given an opportunity to communicate them to the railway company that it might ascertain whether the company was willing to concede any of the proposed terms.

The railway company now refuses to accept these terms, except one for allowing rights of crossing on foot over the railway to the river.

The River road ran along the river bank in some places close to the foreshore; in other places leaving small pieces of land between it and the river. The Fraser river opposite the places in question is a tidal navigable river.

Counsel for the landowners stated at the hearing that, in 1896 (probably 1906) the township of Delta passed a by-law for the diversion of the highway practically covering the diversion ordered by the Board.

The company claims to have a grant from the provincial government of the foreshore along the diverted portion of the highway.

The conditions asked for by the landowners were as follows:—

1. The company shall pay compensation under the Railway Act to the respective owners of land on the Fraser river where the railway is to be built on the basis as if the present highway were closed and the land reverted to the owners of the adjacent land.

2. The company shall pay compensation under the Railway

Act to the owners of the land for the right of way for the diverted highway.

3. The company shall permit James Plester, Jensen and Gunderson, G. Johnson, Jens Gunderson and K. Larsen, each, and the heirs and assigns of each, to have a crossing over the railway opposite his land, and to build and maintain a landing and net-house not exceeding 80 feet on the Fraser river and distant at least 20 feet from the centre line of the railway.

4. The company shall pay G. Johnson and Jens Gunderson each \$1,000 on account of compensation that may be due to each two months previous to construction of the railway over his land.

5. The company shall pay the trustees of the Scandinavian Church \$2,000 on account of compensation that may be due them two months previous to construction of the railway over their land.

6. The company shall construct a sufficient wagon road to enable James Plester to drive from his residence on the north half of lot 16, group 2, New Westminster District, to the new highway.

At a subsequent hearing, condition No. 6 was expressly abandoned, and conditions Nos. 4 and 5 not really insisted upon.

When the Board allowed the matter to stand over for the purpose of having the suggested conditions communicated to the railway company, it was with the hope that some arrangement might be made which would satisfy the landowners, and not because the Board had formed any opinion that any of the conditions asked for should be imposed.

It appears to me that we should make the order without qualifying it by any conditions, except the one which the company is willing to have incorporated in the order. The first condition asked for is that the company shall pay compensation to the landowners for the portion of land on which the railway is built, upon the basis that the land on which the railway runs reverts to the owners of the adjoining lands upon the closing of the highway.

It is not at all clear that such is the effect of the diversion; if so, the party in whom the land occupied by the old highway

vests, will naturally be entitled to compensation for the taking of his land by the railway company. If such is not the effect, then there is no reason why compensation should be given on such a basis. If the municipal by-law was sufficient of itself for the diversion of the highway and to close the old highway to public traffic, the question of the landowner's right to compensation must be determined by the local law and by the local courts. If it was not sufficient, and the closing of the old highway is effected by the exercise of the company's powers under the Railway Act and the Board's order, the landowners should be left to take such compensation as, under the Railway Act, they are entitled to. This application is one for taking a strip out of another portion of their lands, and it does not appear that any condition should be imposed not directly relating to the taking of the land for which authority is now sought. The second condition asked for relates to such compensation. It is not necessary to impose a condition for that purpose. The parties whose lands are taken have a right to compensation under the Railway Act for the taking of their land and the injury done by severance of the remainder. This is admitted by both parties.

The third condition is one for certain crossings and the right to build and maintain landings and net-houses on the company's right of way next the river opposite the lands of the respective owners.

As I have said, the railway company is willing that foot crossings should be allowed to these owners. Apparently the land is not suitable for crossing otherwise than on foot, and it is reasonable that these parties should have crossings in the nature of farm crossings, particularly those whose holdings extend to the river side. These latter need no condition to enable them to have landings and net-houses.

As to those whose land does not extend across the highway, it is reasonable that they should have access to the water; but there seems to be no reason for imposing upon the railway company an obligation to give up, for the purposes of landings or buildings, any land not belonging to the parties whose lands they are taking.

I think that the order authorizing the company to take the land applied for should be granted, with conditions that the foot crossings, to which Mr. Ritchie at the last hearing limited his request, shall be allowed by the company.

THE DEPUTY CHIEF COMMISSIONER:—I agree.

February 26, 1908. MR. COMMISSIONER MILLS (dissenting):— I am strongly of the opinion that the Railway Commission should not open the way for law suits, nor advise people to go to the local Courts to determine and obtain their rights, unless it is really necessary to do so.

Taking the case of six or seven poor fishermen on the banks of the Fraser river, in the township of Delta, British Columbia, I think it is cruel to send them to the local Courts to settle the points at issue between them and the Great Northern Railway Company, when the problems submitted can be solved and the suggested law suits avoided simply by putting into the order for expropriation the terms and conditions on which the railway company can obtain the rights and privileges for which it has applied under section 178 of the Railway Act.

It is possible that these concessions or conditions should have been imposed when the application for approval of location was under consideration; but I, for one, was not aware of the facts at the time; and I would rather vary the order approving of the location, if that is necessary, than send such people to the Courts to obtain their rights. I maintain, however, that these rights can be secured by imposing conditions in the order now applied for.

As nothing is gained by dissenting judgments, I have ventured to submit an alternative draft order embracing two conditions not yet approved of by my colleagues; and I wish to state briefly my reasons for asking that these conditions be imposed upon the applicant company.

First. As to compensation to the owners of land, for the portions of their land which they were formerly given for the river-

bank road, which portions the railway company has recently been authorized to take. The company argues that, in as much as it has to buy land for a new road on the hillside, it should not be required to purchase any portion or portions of the road which it is taking along the river bank. I think, however, that the claim of the landowners is a reasonable one, because they gave their land along the river bank without compensation, for the purpose of getting a level or comparatively level road in that locality. This road is now taken from them for the benefit of the railway company; they are deprived of the benefits which the grant of that portion of their land was made to secure; and a very crooked road at an elevation of 93 feet up the hillside is not an equivalent for the road of which they are deprived.

I think that any one who notices how crooked the proposed road on the hillside is and bears in mind that, according to the statement of our engineer, it involves an ascent of 93 feet above the level of the present road, will admit that it is not, in any proper sense, an equivalent for the latter; and that, therefore, the railway company should not only provide and construct the inferior high-level road, but pay the complainants for the portions of their land which were given for the comparatively level and much better road by the river.

This is my reason for thinking that the request of the people set forth as condition 3 in the draft order submitted, should be granted.

Second. In as much as the men herein referred to are all fishermen depending upon access to the river for their livelihood, they should not be refused the right to construct net-houses and landing platforms along the river bank. To refuse them this privilege is to drive them out of business, making the remainder of their land valueless and compelling them to go elsewhere. This, I think, is something which the Board should not do; and, for that reason, I would suggest that they be each allowed to build a net-house or net-houses and a landing-platform or platforms on the right of way of the applicant company, where it comes to, or within 25 feet of, the Fraser river, provided he does

not occupy more than 80 feet of space along the river bank and does not build, construct, or place any structure or thing within 25 feet of the centre line of the right of way of the applicant company.

Application was made for permission to occupy, for such purposes, the land on the river bank, to within 20 feet of the centre line of the railway track; but, with a view to provide for the possibility of a double track, I have increased the space to 25 feet from the centre line of the right of way, allowing the applicants, for the length of 80 feet on each lot, to use the right of way for a width of only 25 feet (instead of 30 feet), wherever the said right of way comes within 25 feet of the river; and I am making this suggestion as a compromise, in the hope that it may be approved of by my colleagues—granting the landowners the privilege of building and using net-houses and platforms as above, on condition that they keep distant 25 feet, instead of 20 feet, from the centre line of the right of way of the railway company (see sketch of right of way and double track line submitted herewith).

The death of Chief Commissioner Killam having occurred before the above suggestions were considered, and the Deputy Chief Commissioner having since concurred in the judgment of the late Chief, I have to dissent from the said judgment and the order based thereon.

See next case and order of the Board.

BRITISH COLUMBIA.]

[CLEMENT, J.

[FULL COURT.

MUNICIPALITY OF DELTA V. VANCOUVER, VICTORIA & EASTERN R.W.
AND NAV. CO.

(14 B.C.R. 83.)

Railways—Board of Railway Commissioners—Full Court—Co-ordinate jurisdiction—Order made by Board—Action in Supreme Court for non-compliance with such order—Appeal—Stay of proceedings.

In an action by a municipality for an injunction against a railway company to restrain the latter from closing up or interfering with a certain road, it developed that the Board of Railway Commissioners had made an order authorizing the railway company to divert a portion of the said road and construct their line between certain points of such diversion. The trial Judge decided that the municipality could maintain such an action only by the Attorney-General as plaintiff.

Held, on appeal, that, while the Court had jurisdiction to grant all proper relief, the Board of Railway Commissioners having dealt with the matter, the plaintiffs should apply to the Board for relief as they had complete control over their order.

ACTION tried before Clement, J., at Vancouver on the 2nd, 24th and 25th of September, 1908.

The plaintiffs claimed an injunction to restrain the defendants from closing up or interfering with a road called the River road along the south bank of the Fraser river within the municipality, and directing the defendants to restore the said portion of the River road to the condition it was in prior to the defendants' interfering with the same, until they should have properly diverted the highway in accordance with the order of the Board of Railway Commissioners made on the 5th of August, 1907, and for damages.

The statement of claim alleged that on the 5th of August, 1907, an order was made by the Board of Railway Commissioners authorizing the defendants to divert the Ladner highway along the Fraser river, known as the River road, to the extent and in the manner shewn on a plan and profile on file, and to maintain, construct and operate its railway along and upon the existing portions of the said highway between the points of diversion; that

the railway company had proceeded to construct its railway along the highway between the points of diversion and rendered the same impassable to all foot passengers or carriages; that by reason of the said obstruction, the general public and persons lawfully desiring to use the said highway have been prevented from using the same, and have been put to delay, injury and damages. The plaintiffs therefore claimed a mandatory injunction directing the defendants to restore the said portion of the River road to the condition in which the same was before they commenced the construction of their railway, and an injunction to restrain the defendants from proceeding with any works or erection upon the said portion of the River road until they had diverted the said highway to the extent and in the manner directed by the order of the Board of Railway Commissioners. It was not denied that the defendant company had constructed the road referred to in the order of the Board of Railway Commissioners, and that the same had been in use by the public. The provincial government had erected a public school on the new road. Further, it was not claimed that the railway company had in the course of their works done anything which was not necessary for the construction of their railway and not contemplated by the order of the Board of Railway Commissioners. Immediately after the defendant company had commenced the construction of their railway along the highway, some of the landowners whose lands had not been expropriated for the new road, placed obstructions on the same.

The municipality of Delta had in 1906 passed a by-law establishing a highway in lieu of the highway which was to be used by the defendant. It was intended at the time of the passing of this by-law that the right of way for the new highway should be acquired by the municipality under the provisions of the Municipal Act, and that the railway should recoup the municipality for their expenses in that behalf. The municipality, in February, 1908, after the road had been constructed, passed a by-law repealing their 1906 by-law.

Sir C. H. Tupper, K.C., for plaintiff municipality.

A. H. MacNeill, K.C., for defendant company.

October 7, 1908. CLEMENT, J.:—On a careful consideration of the authorities I have arrived at the conclusion that the plaintiffs are, to quote the language of Collins, M.R., in *Devonport Corporation v. Tozer* (1903), 72 L.J. Ch. 411, at p. 416, “trying to put in suit a public wrong,” and therefore “they must do it in the recognized way, namely, at the suit of the Attorney-General.” See *Wallasey Local Board v. Gracey* (1887), 56 L.J. Ch. 739; *Tottenham Urban District Council v. Williamson & Sons* (1896), 65 L.J. Q.B. 591; *Attorney-General and Rhondda Urban Council v. Pontypridd Waterworks Co.* (1908), 77 L.J. Ch. 237.

I do not overlook the line of authority, of which *Attorney-General v. Logan* (1891), 2 Q.B. 100 and *Wednesbury Corporation v. Lodge Holes Colliery Co.* (1907), 76 L.J. K.B. 68, may be noted, that for an injury done to a proprietary right vested in a municipality or local board, the municipality or local board may seek redress in its own name; nor the argument of counsel for the plaintiff municipality that the “possession” of the highway in question here, which by section 242 of the Municipal Clauses Act (B.C. Stat. 1906, ch. 32), is “vested in the municipality,” is a proprietary right within the meaning of the cases, for an invasion of which right the plaintiff municipality can sue. One short answer to this argument is that this action is avowedly for a public wrong and not for any invasion of the plaintiff municipality’s “possession.” It is perhaps unnecessary for the determination of this case to attempt to define what is covered by the word “possession” in the section in question. Does it mean more than the expression “control and management” found in other similar Acts? Suffice it to say that in my opinion it is a “possession” subject to the public right to pass and repass: see *Hickman v. Maisey* (1900), 69 L.J.Q.B. 511—and it is for an obstruction to this public right that this action is, as I have said, avowedly brought. I take it to be settled law that for an obstruction to a

public highway the only remedy open to the public is by indictment or information at the suit of the Attorney-General, the recognized embodiment in that behalf of the public. To radically change this law so as to substitute another person or body for the Attorney-General in such cases would, I think, require clearer language than is to be found in section 242, above mentioned. If, indeed, the obstruction works to some particular person a special peculiar injury, different in kind and not merely in degree from that suffered by the general public, such particular person may seek redress in his own name, alleging and proving the special peculiar injury: see *Harvey v. British Columbia Boat Co.*, not yet reported. No such exceptional case is put forward here.

If I may say so with respect, I entirely agree with what was said by Romer, L.J., in *Devonport Corporation v. Tozer*, *supra*, at p. 417, that "it is rather to be deprecated that public bodies such as the plaintiffs in this case should be at liberty, without the leave of the Attorney-General, to commence expensive proceedings such as these at their own will." This very action gives point to the quotation, for it appears from the evidence that it was brought at the instance of or under pressure from certain landowners through whose lands the defendants have constructed a road intended to take the place of the highway in question here, and who chafed—perhaps quite justifiably, I really cannot judge—at the defendants' delay in paying for the land taken from them for the new road.

I should perhaps add that I have not thought proper to discuss the cases cited from Ontario and Nova Scotia, because I am, I think, bound by decisions of the English Court of Appeal to decide as I do: see *Trimble v. Hill* (1879), 49 L.J.P.C. 49. In *Tottenham Urban District Council v. Williamson & Sons*, *supra*; *Wallasey Local Board v. Gracey*, *supra*, is expressly approved by the Court of Appeal, and to my mind *Wallasey Local Board v. Gracey* is indistinguishable from the present case. An injunction was there sought by a local board, in whom not merely the "possession" of the streets but the "streets" themselves were vested, to restrain the defendants from, *inter alia*, allowing noxious and

offensive matter to be dropped upon the streets from their carts. *Vestry of Bermondsey v. Brown* (1865), L.R. 1 Eq. 204, cited and approved of in *Wallasey Local Board v. Gracey*, *supra*, was also a case of highway obstruction, although, it is true, the nature of the local body's interest in or right of control over the street does not very clearly appear.

In *Wallasey Local Board v. Gracey* reliance was placed by counsel, for the local board, upon section 107 of the English Public Health Act, 1875, giving power to the local board to "cause any proceedings to be taken against any person in any superior court of law or equity to enforce the abatement or prohibition of any nuisance"; but even this was held ineffective to enable the local board to sue without the Attorney-General. Our Municipal Clauses Act (secs. 50, 55, 107) gives power to the plaintiffs to pass by-laws "for the prevention and removal of nuisances," but no such supplementary power as is contained in sec. 107 of the English Public Health Act, 1875, above referred to. The argument here for the plaintiff is therefore by so much the weaker.

The action is dismissed with costs.

The appeal was argued at Vancouver on the 10th of December, 1908, before Hunter, C.J., Irving and Morrison, JJ.

Griffin, for appellant (plaintiff) municipality.

A. H. MacNeill, K.C., for respondent (defendant) company.

December 10, 1908. HUNTER, C.J.:—Inasmuch as the plaintiffs are seeking to obtain an order from this Court on the defendants to undo what they have done under the authority of the Railway Board, and as that Board having the powers of a superior Court is amply clothed with authority, either by alteration or rescission of their order or by a remedial or ancillary order to give all necessary relief to the plaintiffs or any other party aggrieved by the mode in which the work has been carried out, while we do not deny that we have jurisdiction if need be to award all proper relief, we think that under the circumstances

the plaintiffs should first apply to the Board on much the same ground as a Court acts when it finds that another Court of concurrent jurisdiction has made an order over which it has complete control.

The appeal will, therefore, be enlarged till the next sittings in order to enable the plaintiffs to make such application to the Board as they may be advised.

Irving and Morrison, JJ., concurred.

Order accordingly.

Solicitors for appellants: *Tupper & Griffin.*

Solicitors for respondents: *MacNeill & Bird.*

The municipality of Delta applied to the Board to restrain the railway company from closing the River road.

The following order was made:—

March 3, 1909. THE CHIEF COMMISSIONER:—Upon reading the evidence heretofore given upon this application, and the affidavits, documents, and plans filed; upon hearing counsel for the parties, and having made a personal inspection of the locality in question—

IT IS ORDERED

1. That the various applications made to the Board in this matter be treated as an application by the railway company for leave to divert the highway in question and to acquire the necessary lands for the re-location of the same, as shewn upon the plan filed.

2. That authority be, and the same is hereby, given to the railway company to divert the said highway known as the Ladner highway, and to acquire the necessary lands for the re-location of the same along the route and through the lots as shewn upon the plan filed, upon and subject to the following terms and conditions:—

(a) The whole matter shall be, and the same is hereby re-

ferred to J. H. Senkler, K.C., as sole arbitrator, agreed upon by all parties to fix and determine the sum or sums to be paid to each and all landowners for the land or lands taken for the diversion of the said highway, and damages, if any consequent upon such taking for severance or otherwise.

(b) To fix and determine the sum or sums to be paid to each and all landowners for the land or lands taken by the railway company for its right of way along or in the vicinity of the old Ladner highway, and for the deprivation suffered by such landowners of all rights and privileges of every kind exercised or enjoyed by them or any of them as incident to the said land or lands, the owners thereof to be regarded as riparian proprietors, with frontage upon the Fraser river.

3. The said arbitrator shall have full power and authority to dispose of all questions of costs, not only of the arbitration, but all costs that the landowners, the municipality of Delta, and the railway company have hitherto incurred or been put to in connection with this matter, and direct how and in what manner and by and to whom such costs shall be borne or paid, including the arbitrator's fees.

4. The said railway company shall, within three months, do all necessary work and furnish all necessary materials to put the present Ladner highway as diverted in such condition as H. J. Cambie, Esquire, C.E., shall, by his report, direct, he to have authority to say if the present wooden bridge should be replaced by a fill and culvert, and, if so, in what manner, and as to the necessity of guard rails at any point or points along the said highway, the necessity of widening the highway at any point or points, and all and every other matter necessary to the said highway being put in a permanent, safe and satisfactory condition for the use of the public.

5. After the completion of the said highway to the satisfaction of the said H. J. Cambie, Esquire, C.E., the railway company shall thereafter maintain the same for the period of three years from the date of such completion, except that such maintenance shall be to the entire satisfaction of the said H. J.

Cambie, Esquire, C.E.; and if at any time during the said period of three years, the municipality of Delta shall deem the said highway to be out of repair, they may call in the said Mr. Cambie, and the railway company shall forthwith do all necessary work that may be required of them to fully carry out the intent of this order.

6. All costs, charges, and fees payable to the said H. J. Cambie, Esquire, C.E., shall be disposed of by the said J. H. Senkler, K.C., who shall by his award direct how and by whom the same shall be paid, not only as to such as may become payable before such award is made, but also by whom such costs, charges, and fees shall be paid during the three years the railway company is required to maintain the said highway.

7. If any disputes arise as to the meaning of this order, or if any other matter arise not herein provided for, any party may apply to the Board for further directions.

CONTRACT—LIMITING LIABILITY.

SASKATCHEWAN.]

[LAMONT, J.

MASON & RISCH PIANO CO. v. CANADIAN PACIFIC R.W. CO.

(1 Sask. L.R. 213).

Common Carrier—Liability for Damage to Goods in Transit—Contract Limiting Liability.

Held, that in action against a carrier for damage to goods in transit, it must be proved that the goods were undamaged when delivered to the carrier.

2. That when goods are shipped by rail under a contract limiting liability and providing for transport at owner's risk, the railway company is not liable for damage to such goods unless it be proved that such damage is the result of negligence on the part of the company.

THIS was an action to recover from the Canadian Pacific Railway for damage alleged to have been sustained by goods while in transit. The facts are fully set out in the judgment.

J. F. L. Embury, for the plaintiff.

J. A. Allan, for the defendant.

August 7, 1908, LAMONT, J.:—This is an action for damage to a piano carried by the defendants for the plaintiffs from Regina to Saskatoon. On or about September 11th, 1905, the plaintiffs' agent at Regina, Norman Edgar, boxed up two pianos and shipped them to Saskatoon to his own order. The pianos were sent from the plaintiffs' warehouse in Regina to the defendants' freight shed on a dray, and were there placed in the defendants' car for shipment. The pianos were carried by the defendants to Saskatoon where, on September 11th, 1905, Edgar signed a receipt for them to the defendant company, in which receipt the pianos were described as being in good order. Edgar, after signing the receipt unloaded one of the pianos from the car, but, having no warehouse or place of business in Saskatoon, made arrangements with the defendants' freight agent to have the other piano placed in the defendants' freight shed. About a month afterwards, having made a sale of the said piano to one Tofft, Edgar had the piano placed on a dray and told the driver to take it to Mr. Tofft's house. When the piano arrived at Tofft's house and the box was taken off the dray it was discovered that the piano had been damaged; the action was jammed and some of the posts split and broken.

Edgar testified that from the character of the damage done he believed it was caused by the piano falling on its back or end. No evidence was given as to how or when the damage was done to the piano; no evidence was given that it did not fall while in the possession of the drayman in being taken from the plaintiffs' warehouse to the defendants' freight shed in Regina, or from the defendants' freight shed to Tofft's house in Saskatoon. The only evidence given was by the freight clerk at Saskatoon, who testified that the damage was not done either in unloading the piano from the car, or while in the defendants' freight shed at Saskatoon.

On behalf of the defendants it was contended (1) That there

was no evidence to shew that the piano was damaged while in the defendants' possession, or that the defendants had in any way been guilty of negligence; and (2) that the piano was carried by the defendants under the terms of a special contract which provided that the defendants should not be liable for or in respect of the loss or damage to (among other articles) musical instruments carried by them, and if such property was accepted or carried, it was entirely at the risk of the owner without liability direct or indirect on the part of the company.

As to the first of the above contentions, the plaintiffs did not establish that the piano was damaged while in the possession of the defendants, and it seems to me that there is just as strong a presumption that it was damaged while in the possession of the drayman as while in the possession of the defendants. The plaintiffs' agent, Edgar, could not say that he was present at the loading or unloading of the piano in Regina, or that he went with the drayman to the freight shed. I cannot therefore presume that the damage was caused by the defendants.

As to the second point, the contract purports to limit the liability of the defendants as common carriers. Section 340 of the Railway Act reads as follows: "No contract, condition, by-law, regulation, declaration or notice made or given by the company, impairing, restricting or limiting its liability in respect of the carriage of any traffic, shall except as hereinbefore provided, relieve the company from such liability, unless such class of contract, condition, by-law, regulation, declaration or notice shall have been first authorized or approved by order or regulation of the Board." The Board referred to is the Board of Railway Commissioners. On October 17th, 1904, the Board made an interim order authorizing the use by the defendants of the form of the shipping contract which they used in this case, and which contained the clause above referred to. The plaintiffs are, therefore, bound by the terms of the contract. The construction of this contract was considered in the cases of *Booth v. The Canadian Pacific Railway Company*, 2 Can. Ry. Cas. 389, and in *Costello v. The Grand*

Trunk Railway Company, 7 O.W.R. 846, and it was there held that the conditions of the contract absolved the railway company from liability for damage to goods of the classes set out in the clause unless it was shewn in evidence that the company or its servants had been guilty of negligence.

As no negligence was shewn in this case the plaintiffs cannot recover. There will be judgment for the defendants with costs.

ONTARIO.]

[DIVISIONAL COURT.]

MERCER V. CANADIAN PACIFIC R.W. CO.

(17 O. L. R. 585.)

Railways—Carriage of Goods—Special Contract Limiting Liability—Negligence—Notice of Loss—Omission to Give—Railway Act, R.S.C. 1906, ch. 37, secs. 284 (7), 340.

By sec. 284 (7) of the Railway Act, R.S.C. 1906, ch. 37: "Every person aggrieved by any neglect or refusal of the company to comply with the requirements of this section shall, subject to this Act, have an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or its servants." By sec. 340: "No contract, condition, by-law, regulation, declaration or notice made or given by the company, impairing, restricting or limiting its liability in respect of the carriage of any traffic, shall, except as hereinafter provided, relieve the company from such liability, unless such class of contract, condition, by-law, regulation, declaration or notice shall have been first authorized or approved by order or regulation of the Board. (2) The Board may, in any case, or by regulation, determine the extent to which the liability of the company may be so impaired."

The defendants received from the plaintiff a mare, with other animals, to be carried from a station on their line of railway in Ontario to a point in British Columbia, under a special contract, which had been approved of by the Railway Board, (which the plaintiff signed). Under this contract the animals were carried at a lower rate than the company were entitled to charge. The contract contained a provision that the defendants should in no case be responsible for any amount exceeding \$100.00 for the loss of any one horse, or a proportionate sum in any one case for injuries to same, and that any loss or damage should be computed and paid for on such basis. There was a further provision relieving the company from liability, "unless a written notice, with the full particulars of the loss or damage and of the claim to be made in respect thereof, is delivered to the station agent at the said point of delivery within 24 hours after the said property, or some part of it, has been delivered."

During the carriage on the railway, the mare was, through the defendants' negligence, seriously injured. Before the consignment arrived at its destination the plaintiff, finding that the mare was permanently injured, by the permission of the railway superintendent there, removed the mare from the car at an intermediate station and sold her at a loss, the remainder of the shipment being carried on to the place of delivery. No notice of the loss was given there to the company's official within the 24 hours:—

Held, that notwithstanding the loss was sustained through the defendants' negligence, the special contract was binding on the plaintiff, so that in no event could he recover more than the proportionate part of \$100; but that the omission to give the required notice relieved the company from all liability.

Robertson v. Grand Trunk R.W. Co. (1895), 24 S.C.R. 611, followed; *St. Mary's Creamery Co. v. Grand Trunk R.W. Co.* (1904), 8 O.L.R. 1, distinguished.

Judgment of the county court of the county of Grey affirmed.

THIS was an appeal from the judgment of the county Judge of the county of Grey in an action tried on June 9th, 1908.

The action was brought to recover damages for an injury to a mare, belonging to the plaintiff, shipped by him from Markdale Station, Ontario, to New Westminster, British Columbia.

I. B. Lucas, for the plaintiff.

Shirley Denison, for the defendants.

The defendants admitted negligence, and the whole question was as to the defendants' liability under the conditions of the shipping bill.

The learned county court Judge, after setting out the facts and the conditions of the shipping bill, and discussing the authorities, was of the opinion that, if the plaintiff was entitled to any sum, he would be entitled to \$100, but as he had omitted to give the notice of the loss or damage sustained by him to the station agent at the point of delivery within 24 hours as required by the conditions, the defendants were not liable, and he entered judgment in their favour.

From this judgment the plaintiff appealed to a Divisional Court.

On October 7th, 1908, the appeal was heard before FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

W. H. Wright, for the appellants. Before proceeding with the argument, he asked that certain letters which passed between the plaintiff and the officials of the company should be admitted, as shewing a waiver on the defendants' part of the necessity to give notice.

Shirley Denison, contra, objected to their admission, but urged that, if admitted, the defendants should have the right to furnish explanatory evidence. The Court decided to admit the letters, provisionally but in any case subject to the right asked for by the defendants; and the argument proceeded.

W. H. Wright. The defendants admit negligence, and therefore they are precluded, under sec. 284 (7) of the Railway Act, R.S.C. 1906, from setting up the condition in the shipping bill limiting their liability. The condition must be read as if it contained the words "provided there is no negligence:" *St. Mary's Creamery Co. v. Grand Trunk R.W. Co.* (1904), 8 O.L.R. 1; *Price v. Union Lighterage Co.*, [1904] 1 K.B. 112; *Booth v. Canadian Pacific R.W. Co.* (1906), 7 O.W.R. 593; *Costello v. Grand Trunk R.W. Co.* (1906), 7 O.W.R. 846; *Mason v. Grand Trunk R.W. Co.* (1875), 37 U.C.R. 163. The words contained in sec. 284, "subject to this Act," are relied on as incorporating sec. 340 with it, under which the contract must be approved by the Board of Railway Commissioners, and, having been so approved, the restrictions contained in sec. 284 (7) do not apply. The object, however, of sec. 340 is not to limit the protection affirmed by the first-named section. All the Board could do was to affirm a contract which the defendants could, under the Act, legally make. If they in terms attempted to confirm a contract which relieved the Company where negligence was proved, they would clearly be exceeding their jurisdiction. There was no necessity of giving notice at New Westminster. What took place at Cardwell Junction and Calgary clearly amounted to a waiver or dispensation of such notice. The correspondence asked to be now admitted clearly shews this. It was impossible for the plaintiff to have given notice at New Westminster: *Sheppard v. Canadian Pacific R.W. Co.* (1908), 16 O.L.R. 259.

Shirley Denison, for the respondents. The rate at which the goods were carried was a special rate given to the plaintiff, and by virtue of such special rate, which was a lower rate, the defendants contracted for a limitation of liability—namely, that the liability was not to exceed \$100 for each horse. The defendants admit that there was negligence, but say that the defendants could only be liable to the amount stipulated for in the special contract: This is clearly laid down in *Robertson v. Grand Trunk R.W. Co.*, (1895) 24 S.C.R. 611; and, being a decision of the Supreme Court, this Court will, be governed by it. The case of *St. Mary's Creamery Co. v. Grand Trunk R.W. Co.*, 8 O.L.R. 1, in no way interferes with this decision, but, in fact, recognizes it. No such contract as is here set up was set up in that case. See also *Baxter v. Royal Mail*, [1908] 1 K.B. 196, affirmed, [1908] 2 K.B. 626. The company were entitled to the twenty-four hours' notice. The correspondence does not help the plaintiff, as the notice must be given to the official at New Westminster. The plaintiff was allowed, for his own convenience, to take the mare out at Calgary, and this in no way interfered with his obligation under the condition. The fact that the mare never arrived at New Westminster did not dispense with the notice. The notice must be given within the twenty-four hours after the arrival of the rest of the shipment: *McMillan v. Grand Trunk R.W. Co.* (1888), 16 S.C.R. 543; *Vogel v. Grand Trunk R.W. Co.* (1885), 11 S.C.R. 612; *Sutherland v. Grand Trunk R.W. Co.*, now before the Court of Appeal, *infra*, page 389, *Hayward v. Canadian Northern R. W. Co.* (1906), 6 Can. Ry. Cas. 411, 16 Man. L.R. 158; *Sheppard v. Canadian Pacific R.W. Co.*, 16 O.L.R. 259.

December 11, 1908. BRITTON, J.:—The facts of the case are fully set out by the learned county court Judge and by Mr. Justice Riddell.

I entirely agree with the county court Judge that the escape of the defendants from liability for a small part of the actual damage to the plaintiff's mare is entirely due to what may be fairly called a technicality.

The special contract must govern. There is plenty of authority on that point.

As to the measure of damages, the contract seems clearly enough expressed. It says that the defendants "shall in no case be responsible for any amount exceeding \$100 for any one horse" . . . "or a proportionate sum in any one case for injuries to same."

The actual value of the horse injured was \$800; yet had the horse been killed outright or died as the result of injuries caused by the defendants, the plaintiff could have recovered only \$100.

The horse was sold in his injured condition for \$450. The actual loss therefore was \$350, or seven-sixteenths of the value. The defendants' liability—if liable at all—for the horse would be seven-sixteenths of \$100—\$43.75.

The defendants admit negligence, but they say they are not liable at all because of a relieving clause in the special contract, which reads as follows:—

"The company shall not be liable for any loss or damage which may happen to the said stock, even while on the railway operated by the company, unless a written notice, with the full particulars of such loss or damage and of the claim to be made in respect thereof is delivered to the station agent at the said point of delivery within 24 hours after the said property, or some part of it, has been delivered."

If this matter was *res integra*, I should hold that the clause quoted does not apply to the plaintiff's case. It was never intended to apply to such a case. The defendants knew long before the uninjured animals arrived at New Westminster all about the damage to the mare, which had to be removed from the car a thousand miles or more before reaching its destination. The defendants themselves have chosen to treat each animal as a separate article in the consignment, and by that contract limit their liability to \$100 for loss of any one horse, and a proportionate sum in any one case for injuries to same. Treating the mare as a single consignment, it never arrived at the named "point of delivery," and is, so far as the defendants' liability

is concerned, the same as if a whole car load of animals was destroyed by defendants' negligence a few miles from the starting point.

In the case last mentioned, where no part of the property shipped could ever arrive at the point of delivery, the clause should not apply, and no more should it where, as in this case, the shipping bill deals with the animals separately, and one is removed in transition because of injury occasioned by the admitted negligence on defendants' part, under circumstances well known to them. But, notwithstanding what seems to me a fair and reasonable construction of the contract, the case of *McMillan v. Grand Trunk R.W. Co.*, 16 S.C.R. 543, is an authority in favour of the defendants, which the learned county Judge followed, and rightly I think. The defendants are, of course, entitled to the benefit of every interpretation of law favourable to them. In this case, with the saving clause as to amount of damages in their favour—admitting negligence, as they have done, the wonder to me is why the defendants invoke the want of a notice, which was not necessary for their information as to plaintiff's loss and the cause of it.

The appeal should be dismissed, but it should be without costs.

RIDDELL, J.:—This is an appeal from the county court of the county of Grey, and, though the amount involved is not large, very important questions of law are raised.

The facts are simple.

The plaintiff, a dealer in and breeder of brood mares, etc., on the 11th September, 1906, shipped at Markdale, for transportation to New Westminster, the mare in question in this action and other animals. The car in which were the animals left Markdale, and was brought and left upon the switch at Cardwell Junction, waiting for the Grand Trunk Railway Company's train to transport it to North Bay. While on this switch the servants of the defendants negligently ran an engine against it, and injured the mare. The car was taken up by the Grand Trunk Railway, and handed over to the Canadian Pacific Railway at the connecting point, and by them taken as far as Calgary. At Calgary the plaintiff, who had gone along with his animals, seeing that

the mare could not get better, went to the superintendent at that point, and asked permission to unload. This permission was granted, and the mare was taken off the car and sold. The price realized was \$450. Had she not been injured, the plaintiff would have expected to receive \$800 or \$900. She is said to have cost in Scotland £70, and as laid down at Markdale \$450. There is no evidence of her value in Ontario, and therefore we may assume that \$450 was her real value here. The plaintiff estimates the damage to her in Ontario at \$200.

At the trial before the learned Judge of the county court of the county of Grey judgment was given for the defendants upon the cause of action now under consideration. The plaintiff appeals, and asks, further, that other evidence be now received.

The animals were received under a special contract, referred to in the statement of defence. That it is not necessary specifically to plead the terms of the contract in an action framed as this is is decided by the Supreme Court in *Lake Erie and Detroit River R.W. Co. v. Sales* (1896), 26 S.C.R. 663: see especially pp. 673 *et seq.*

The special contract (so far as material in the present inquiry) reads as follows:—

“Canadian Pacific Railway Company.

“Live Stock.

“Special Contract.

“Markdale Station, Sept. 11th, 1906.

“The Canadian Pacific Railway Company has received from Thos. Mercer 9 registered pedigree horses.

“The following property” (the animals are described by name and register number) “to be transported over the Canadian Pacific Railway (and, if necessary, over its connections), and delivered at New Westminster Station, at the rate of 1.20½ per hundred, plus 50% for use of long palace car, under terms of this special contract.

“The company being willing to undertake the transportation of the said property as aforesaid, either at the said rate on the

condition that its liability shall be restricted as hereinafter mentioned or at a higher rate without its liability being so restricted, the shipper hereby elects to have it carried under this contract at the said lower rate and on the said condition, and he declares that of the property covered by this contract no horse or mule exceeds one hundred dollars in value, no head of cattle fifty dollars in value, no other animal ten dollars in value, and that the contents of no car exceed twelve hundred dollars in value.

“RESTRICTIONS OF COMPANY’S LIABILITY.

“The company shall not be liable for any loss or damage in respect of the said live stock by reason of delay of trains, or of escape or loss of any stock from cars, or injuries to animals arising from the bruising or wounding themselves or each other, or from crowding in the cars, or by reason of the manner of loading or unloading of the said stock, or of any other injuries happening to said stock while in any railway car, except such as may arise from a collision of the train or the throwing of the cars from the track during transportation; and shall in no case be responsible for any amount exceeding one hundred dollars for the loss of any one horse or mule, fifty dollars for any one head of cattle, ten dollars for any one other animal, and twelve hundred dollars for the contents of any one car, or a proportionate sum in any one case for injuries to same. . . .

“In case of any loss or damage arising for which said company shall be liable, the same shall be computed and paid on a basis of the actual value of the stock at the place of shipment under this contract, but not exceeding in any case the respective sums above-mentioned; and the company shall not be liable for any loss or damage which may happen to the said stock, even while on the railway operated by the company, unless a written notice, with the full particulars of such loss or damage and of the claim to be made in respect thereof, is delivered to the station agent at the said point of delivery within twenty-four hours after the said property or some part of it has been delivered. . . .

“It is further agreed that under no circumstances shall any

officer, agent or employee of the company waive, verbally or otherwise, the provisions of this contract or any of them.

“(Sgd.) JOHN CÆSAR, Agent.

“The shipper declares that he fully understands the meaning of this special contract.

“(Sgd.) THOS. MERCER, Shipper.”

No written notice or claim was given or made until November 20th, 1906.

The form of special contract was approved by the Board of Railway Commissioners, 17th October, 1904.

The learned county court Judge thought that if the plaintiff was entitled to any sum, he was entitled to \$100; but that, as no notice had been given, the defendants were not liable.

The plaintiff contends that he is not bound by the terms of the special contract at all, and that he is entitled to at least the sum of \$200, for which he sues.

It will be seen that there are two distinct matters calling for inquiry—namely, the binding nature of the special contract, and, if binding, its effect; and that with reference to (1) the damages, and (2) the provision as to notice.

Convenience will be served by a consideration first of the amount of damages, if any, to be awarded.

As to the binding nature of the contract in respect to damages, I think that, irrespectively of the provision in the Railway Act, shortly to be referred to, the contract is of full force and validity. In *Robertson v. Grand Trunk R.W. Co.* (1892), 24 O.R. 75, (1894) 21 A.R. 204, 24 S.C.R. 611, the form of the contract was not dissimilar to that in the present case. The full form may be seen in vol. 134 of Cases in the Supreme Court of Canada, in the general library at Osgoode Hall, being set out at length in the statement of defence, pp. 6,7. I extract such parts as seem to be of importance here.

“Windsor Station, September 15th, 1891.

“Received of Geo. D. Robertson, to be transported over the Grand Trunk Railway and delivered at St. Catharines, Ontario,

Station, at the special rate of seven 20/100 dollars, under the terms of this contract. And in consideration of said agreement at said special rate, it is hereby mutually agreed by and between the parties hereto that the said Grand Trunk Railway shall not be liable for any loss or damage which the said shipper or owner of said live stock may suffer by reason of delay, or by escape or loss of any stock from cars, or by reason of injuries to animals arising from the bruising or wounding themselves or each other, or from crowding in the cars, or from improper loading, or by reason of any loss, injuries or damage happening to said stock while in the cars of said company, except such as may arise from a collision of the train or the throwing of the cars from the track during transportation, and said company shall in no case be responsible for an amount exceeding one hundred (100) dollars for each and any horse or head of cattle, or ten (10) dollars each for sheep, hog or calf transported. . . .

“In case of any loss or damage arising for which said company shall become liable, the same shall be computed and paid for on a basis of not exceeding the value of the stock at the place of shipment under this contract. . . .

“It is hereby further agreed that the Grand Trunk Railway Company shall not be liable for an amount exceeding the values above mentioned for each or any animal transported.”

A racehorse worth \$5,000 was received under this contract, and killed in a collision caused by the negligence of the defendants. At the trial judgment was given for this sum, which was set aside by the Divisional Court, the judgment of the Divisional Court being affirmed by a divided Court of Appeal and by a unanimous Supreme Court. Two questions called for decision in that case (24 S.C.R., at p. 614). First, did the special contract set out in the amended statement of defence, according to the fair meaning of the language used, cover the case of negligence? Secondly, if liability for negligence was by the terms of the contract limited as to the amount of damages to be recovered, was such a stipulation legal, and was it one which it was competent to the respondents to enter into, having regard to the provisions of the statute

(51 Vict. ch. 29, sec. 246, sub-sec. 3) and to what was decided in *Vogel v. Grand Trunk R.W. Co.*, (1883) 2 O.R. 197, (1884) 10 A.R. 162, 11 S.C.R. 612 ?

Both these questions were determined adversely to the plaintiff.

The section referred to reads as follows:—"Every person aggrieved by any neglect or refusal in the premises, shall have an action therefor against the company,—from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or of its servants": 51 Vict. ch. 29, sec. 246 (3) (D.).

The legislation in force now and at the time of the accident now under consideration is R.S.C. 1906, ch. 37, sec. 284 (7): "Every person aggrieved by any neglect or refusal of the company to comply with the requirements of this section shall, subject to this Act, have an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or of its servant." This is almost *totidem verbis* 3 Edw. VII. ch. 58, sec. 214 (3) (D.).

It must be obvious that a contract which is valid and binding when the action is given absolutely and without limitation (as was the case under the Act of 1888), does not lose its validity when the right to an action is expressly made subject to the new Act. Unless we are prepared to disregard the judgment of the highest Court in the Dominion, I am of opinion that we must hold that the contract is valid and binding, and that it provides for the case of negligence on the part of the defendants. No doubt, we may refuse to follow the Supreme Court. "As we are the ultimate Court of Appeal in this county court case, we are bound to give an independent judgment": *Canadian Bank of Commerce v. Perram* (1899), 31 O.R. 116; and we may disregard, as was done in that case, the judgment of the Court of Appeal. See also *Mercier v. Campbell* (1907), 14 O.L.R. 639, at p. 645. In like manner we may, indeed, disregard the judgment of the Supreme Court; but it would be unseemly, to say the least, for a Divisional Court, without the clearest conviction of the erroneous nature

of a judgment of the highest Court in the land, to disregard and *pro tanto* to overrule it—the spectacle would be presented of one rule of decision in one Court and another in another—a man who lost \$200 would have higher rights than one who lost \$5,000. If it were necessary so to decide, I trust we should be sufficiently courageous; but, speaking for myself, I cannot see that the decision of the unanimous Divisional Court (Sir John Hagarty and Mr. Justice Osler) and the unanimous Supreme Court can be said to be wrong. Eminent Judges, indeed—amongst them my Lord—held the contrary view. My Lord, however, was wholly influenced by the commonly accepted interpretation of the *Vogel* case in the Supreme Court, which interpretation the Supreme Court held not to be the true one; and Mr. Justice MacLennan considered that the limitation of liability contended for by the defendants might have been validly effected, but that the wording of the contract was not sufficient. The Chancellor stands alone in coming to a conclusion adverse to the defendants upon principle. I do not think we should even partially unsettle the law. *Misera est servitus ubi jus est vagum aut incertum.*

The decision of the Supreme Court disposes of the argument of the appellant that the negligence of the defendants themselves is not provided for. This argument is based upon the case of *St. Mary's Creamery Co. v. Grand Trunk R.W. Co.* (1903), 5 O.L.R. 742; 8 O.L.R. 1. This case, of course, wholly recognized the authority of the *Robertson* decision; and laid down no rules or principles not in harmony with the Supreme Court judgment therein.

See also *Costello v. Grand Trunk R.W. Co.* 7 O.W.R. 846, where the same conclusion is arrived at by Mabee, J.

All difficulty based upon sec. 340 of the Railway Act is got over by the approval of the Railway Commissioners.

As to the amount of damages recoverable—the liability being admitted—I cannot agree with the learned county court Judge. He says: “The first part of the 4th clause of the ‘Restrictions’ deals with the assessment of damages, and reads as follows: ‘In case of any loss or damage arising for which said company shall be liable, the same shall be computed and paid on a basis of the

actual value of the stock at the place of shipment under this contract, but not exceeding in any case the respective sums above-mentioned.' The meaning of this clause is not very clear. Is it the 'loss or damage' which shall not exceed the respective sums, etc., or is it the basis of value, while it may be below, shall not exceed the respective sums, etc.? The clause is not well constructed, but I believe the former is the correct reading, viz., that such loss or 'damage' shall not exceed, etc. This would in any case allow the plaintiff the full damage of \$100. Somewhat of an anomaly, perhaps, as that is all defendants would have been liable for if the mare had been killed." While, of course, we should not hesitate to adopt this construction, even though it should present an anomaly, if it be the logical construction of the contract, I think the learned Judge has fallen into error in not sufficiently considering the whole contract. It will be seen that the contract starts out with a declaration by the plaintiff that his animal is not worth more than \$100—thence it would follow that he could in no case claim that it was worth more than \$100. But the company do not bind themselves to accept the valuation of the plaintiff—the beast may be worth less, and, if so, the actual worth must be the worth for the purposes of the contract—the animal may be worth less; it cannot be worth more than \$100. Then, in case of loss or damage, "the company . . . shall in no case be responsible for any amount exceeding \$100 for the loss" of the horse . . . "or a proportionate sum . . . for injuries to the same."

It seems to me to be very clearly and expressly provided that the amount for which the company is responsible in case of injury, as distinguished from loss, is to be a proportionate amount. If the injury reduce the value of the horse one-half, the amount for which the company is responsible is one-half the amount for which the company would be responsible in case of loss—that is one-half of \$100—\$50.

The evidence was not directed to such an inquiry, but, upon the evidence we have, it would seem that the value of the horse

was diminished $\frac{800 - 450}{800} = \frac{7}{16}$, and not more.

The plaintiff, then, could not recover more than seven-sixteenths of \$100 = \$43.75. The simple proportion is:

$$800 : 100 :: (800 - 450 =) 350 : x = \$43.75 = \text{loss.}$$

A very tempting argument might be advanced that, under the circumstances of the present case, no damage is proved. It might be argued that the basis of the contract is that the horse is worth not more than \$100. While there is no doubt as to the negligence, the amount recoverable is only the amount by which the value of the animal is diminished below \$100. The animal was not, after the accident, worth less than \$100, and consequently there are no damages.

But neither this nor the interpretation of the learned Judge gives effect to the provision as to the payment of a proportionate sum in the case of injury.

It remains now to consider the effect and validity of the provision as to notice in writing, etc.

In *Mason v. Grand Trunk R.W. Co.* 37 U.C.R. 163, there was a condition in a contract that no claim for damages to, loss of or detention of goods should be allowed "unless notice in writing and the particulars of the claim for said loss, damage or detention are given to the station freight agent at the place of delivery within 36 hours after the goods in respect of which the said claim is made are delivered." This was held to be valid and binding by the full Court, on appeal from the county court of Peterborough.

The statute then in force was the Railway Act, 1868, 31 Vict. ch. 68 (D.); and that provided, sec. 20 (4), that "the party aggrieved by any neglect or refusal on the premises shall have an action therefor against the company." It will be seen that at that time there was no such provision against "contracting out," as now obtains. There can be no doubt that, unless the statutory law interferes, such a provision is perfectly valid.

The next statute to be noticed is the Consolidated Railway Act, 1879, 42 Vict. ch. 9 (D.).

This Act, by sec. 25 (4), provides: "The party aggrieved by any neglect or refusal in the premises shall have an action therefor

against the company, from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company." In this state of the law the case of *McMillan v. Grand Trunk R.W. Co.* (1886), 12 O.R. 103, came on for decision, the shipment having taken place in May, 1882. The shipment took place at Toronto and the loss at Winnipeg, through the negligence of the C.P.R., and not that of the defendants. While the Supreme Court held that a condition such as is in question in this action was perfectly valid, the decision must be read in connection with the facts of the case. It will be apparent that the effect of the latter part of 42 Vict. ch. 9, sec. 25 (4), was not under consideration, and the decision is not of authority in the facts of the present case, except, indeed, in a matter which will be referred to later on. Then came the R.S.C. 1886 ch. 109, sec. 104 (3), which is almost identical with the former section. No change is made in the next revision, the Railway Act, 1888, 51 Vict. ch. 29, sec. 246 (3) (D). The new Railway Act in 1903, 3 Edw. VII. ch. 58, sec. 214 (3) (D.), introduces the important clause, "subject to this Act," and this, as has been pointed out, is continued in the R.S.C. 1906, ch. 37, sec. 284 (7). It is well known that the Act of 1903 constituted a Board of Railway Commissioners for Canada, with very large powers of supervision over railways: see secs. 23, 24, 25. Amongst other things, the Board has full jurisdiction to make orders "with respect to any matter, act or thing which by this . . . Act is sanctioned, required to be done or prohibited:" sec. 25 (q). By sec. 275, "No contract, condition, by-law, regulation, declaration or notice made or given by the company impairing, restricting or limiting its liability in respect of the carriage of any traffic shall relieve the company from such liability, except as hereinafter provided, unless such class of contract, condition, by-law, regulation, declaration or notice shall have been first authorized or approved by order or regulation of the Board. (2) The Board may, in any case, or by regulation, determine the extent to which the liability of the company may be impaired, restricted or limited; and may, by regulation, prescribe the terms and conditions under

which any traffic may be carried by the company." It seems to me not doubtful that the Board is given the power to approve of any class of contract impairing, restricting or limiting the liability of the company, and it also seems to me clear that the limitation in sec. 214 (3), "subject to this Act," is in view of such action on the part of the Board. Parliament has imposed upon the Board the duty of protecting the rights and interests of the shipper and customer of the railways; and I have no doubt that the Board had the power to approve of the form of contract in question here, and that the clause as to notice is one of which the Board could approve; that the said contract, being so approved, is a contract the railway company may lawfully make, and, being made, is legally binding on the plaintiff in all its provisions, including that as to notice.

Of the same opinion was the Court in Manitoba (Richards and Mathers, JJ.), in *Hayward v. Canadian Northern R.W. Co.* 16 Man. L.R. 158, 6 Can. Ry. Cas. 411.

It is true that the Chief Justice of the Common Pleas, in *Sheppard v. Canadian Pacific R.W. Co.* 16 O.L.R. 259, speaking for himself, said that he should desire further consideration before he adopted the judgment of the Manitoba Court as being a correct statement of the law. This is, of course, no decision that the judgment is not law, but merely the caution of a very learned and careful Judge not to commit himself upon any point not necessary for the decision of the case before him.

A point is made that there is great difficulty in determining at what point the notice should be given. I see none. The contract provides that the animals are to be delivered at New Westminster Station, and that the notice is to be "delivered to the station agent at the said point of delivery within 24 hours after the said property or some part of it has been delivered." "The said point of delivery" is neither Markdale, Cardwell nor Calgary, but New Westminster. Nor does any difficulty arise as to the time—the time is to be within 24 hours after the cargo or some part of it has been delivered. Paraphrasing the language of Strong, J., in *McMillan, Grand Trunk R.W. Co.*, 16 S.C.R. 543, at

p. 560 (and it was upon this point that it was intimated above that this case would be referred to), "the only sensible construction which can be placed upon it with reference to this shipment is that when part of the consignment is damaged, and consequently not carried the whole distance, the notice is to be given within 24 hours of the delivery at the named point of delivery, New Westminster, or that part which arrives safely and is delivered." No such difficulty arises in this case as that in the *McMillan* case which gave occasion for the dissent of Mr. Justice Gwynne. Nor does the difficulty arise which might in the case of the shipment of a single animal, though in that case it might well be that the shipper himself, rendering the condition incapable of fulfilment, would not be in a position to obtain relief.

The notice to the agent at Markdale or the superintendent at Calgary, even if otherwise effective, is of no benefit, being oral and the contract providing for a written notice: *Hendrickson v. Queen Ins. Co.* (1870), 30 U.C.R. 108, (1871) 31 U.C.R. 547, and similar cases.

The evidence asked to be supplied consists of several letters from certain officers of the defendants, which, it is argued, constitute a waiver of the terms of the contract as to written notice. In view of the express provision that no officer of the company may, under any circumstances, waive, verbally or otherwise, any of the provisions of the contract, such evidence, even if admitted, could not help the plaintiff: *Atlas Ins. Co. v. Brownell* (1899), 29 S.C.R. 537; *Torrop v. Imperial Fire Ins. Co.* (1896), 26 S.C.R. 585.

I cannot, however, see that there is any reason under the well-established practice to allow this evidence. No doubt the Court, on appeal, may in any case allow further evidence to be given or grant a new trial to enable such evidence to be given. But "a new trial will not be granted if the evidence was known before": *Murray v. Canada Central R.W. Co.* (1882), 7 A.R. 646, at p. 656; *Trimble v. Miller* (1892), 22 O.R. 500. The rule as to allowing further evidence to be adduced upon an appeal is not so rigid, but even the indulgence in this case is not as of course. If we allowed this evidence to be used upon the appeal, we should have to allow the

defendants to explain the circumstances under which the letters were written, and the result would be practically a new trial in this Court. While in a proper case, I should not shrink even from this irregularity upon proper terms, it seems to me that in the present case, where the only amount that can be adjudged to the plaintiff is \$43.75, the Court should not accede to the application. I have, moreover, grave doubts as to the correspondence amounting to a waiver in any event: see *per Street, J.*, in *Cousineau v. City of London Fire Ins. Co.* (1888), 15 O.R., at pp. 334 *et seq.*, and similar cases.

I am of the opinion that the appeal should be dismissed.

In view, however, of the remarks, already referred to, in *Sheppard v. Canadian Pacific R.W. Co.*, and of the peculiar facts of the case, I think justice will be done if, in dismissing the appeal, we do so without costs.

Since the above judgment was given, the decision of the Court of Appeal has been rendered in *Sutherland v. Canadian Pacific R.W. Co.*, *infra*, page 389.

FALCONBRIDGE, C.J.:—I agree that this appeal should be dismissed, but without costs.

ONTARIO.]

[COURT OF APPEAL.

SUTHERLAND V. GRAND TRUNK R.W. CO.

(18 O.L.R. 139.)

Railways—Live Stock Contract—Restriction of Liability—Contract Made in the United States for Transit of Stock to Canada—Provisions of Contract Similar to Those Approved by Railway Board—Validity of Contract—Railway Act, R.S.C. 1906, ch. 37, secs. 284 (7), 340.

The plaintiff delivered to a railway company at Brockton, Mass., U.S., a number of valuable horses for carriage to Grimsby, Ontario, under a contract known as a live stock contract, by which the horses were to be carried on the line of that railway as far as it went and then by connecting lines to the place of delivery, the contract being expressly entered into by the contracting railway on its own behalf, as well as on behalf of the connecting lines. The contract contained a provision that on payment of a specified rate of freight, being a rate lower than that which the company was entitled to charge, liability was to be limited to an amount not exceeding \$100 for each animal, or a total liability not exceeding \$1,200, the plaintiff having the option of shipping at a higher rate and obtaining the company's liability as common carriers. The provision restricting liability was similar to that contained in the form of live stock contract of the defendants approved by the Railway Board under sec. 340 of the Railway Act, R.S.C. 1906, ch. 37. The horses were carried by the contracting railway as far as its line extended, and were then delivered to a connecting railway and thence to the defendants, and during the transit on the defendants' line an accident occurred through the negligence of the defendants, in which some of the animals were killed and others injured:—

Held, that by the terms of the contract it applied not only to the railway company with which it was made, but with the connecting railways, and that by its terms the defendants were exempted from liability beyond the amount stipulated for; and that, even if the approval of the Railway Board was essential to its validity, such approval had been obtained, for it was, in substance, the same class of contract which had been approved.

THIS was an appeal from the judgment in favour of the plaintiff at the trial.

The action was tried before FALCONBRIDGE, C.J.K.B., at St. Catharines, on April 6 and 7, 1908.

E. A. Lancaster, K.C., and *J. H. Campbell*, for the plaintiff.

G. F. Shepley, K.C., and *M. E. Foster*, for the defendants.

The facts are fully set out in the judgments.

At the close of the case the learned Chief Justice delivered the following judgment.

April 27, 1908. FALCONBRIDGE, C.J.:—This is an action brought by the plaintiff against the Grand Trunk R.W. Co. for the loss of some and damage to others of 15 very valuable horses, which were shipped about the 6th of October, by the plaintiff, on the New York, New Haven and Hartford Railway, consigned to himself at Grimsby, Ontario.

The course of the journey was that the New York, New

Haven and Hartford R.W. Co. carried the horses to a certain point, where they were received by the Central Vermont R.W. Co., and then delivered to these defendants.

The plaintiff signed the contract, which is known as a live stock contract, a very long and carefully drawn document, and the main point to be decided in this case is whether this plaintiff is bound to accept the value of \$100 per animal provided in that contract, or whether he is entitled to recover for the whole value of the animals.

I find he has well proved the value of his horses upon incontestable and uncontradicted evidence. If he can go beyond the \$100 per animal, he is entitled to recover all he claims—namely, the sum of \$16,000—but the difficulty is whether he can, in the face of this contract, so recover.

I had a view upon the case when it was argued, and I only reserved judgment for the purpose of considering the numerous cases which were cited in the course of the very able argument, beginning, I think, with *Hall v. North-Eastern R.W. Co.*, L. R. 10 Q.B. 437, decided in England in 1875, and *Mayor, etc., of Hastings v. South-Eastern R. W. Co.*, 6 Q. B. D. 586, decided in 1880, and so on down almost to yesterday.

I have come to the conclusion that the plaintiff is bound by the \$100 *per* horse, which he contracted as being the value. He did that by a solemn contract, in the course of which he stated, "upon the following terms and conditions which are admitted and accepted by the shipper as just and reasonable," and he acknowledges—it may or may not be true—he acknowledges under his own signature that he had "the option of shipping the above described stock at a higher rate of freight according to the official tariff classifications and rules of the said carrier and connecting carriers, and thereby securing the security of the liability of the said carrier and connecting railroads or transportation companies as common carriers." He signs that contract, and, unfortunately, the horses are destroyed or seriously injured by the admitted negligence of the Grand Trunk R.W. Co.

The Grand Trunk R.W. Co., of course, was no party to the

making of this original contract, which is only between the plaintiff and the New York, New Haven and Hartford R.W. Co. It was a through contract over the New York, New Haven and Hartford Railway and the connecting lines. The goods were handed to these defendants upon the face of that contract and bills of lading in pursuance of it; the plaintiff chose to attach that value to his horses, and that value is attached with reference to any carrier in the chain.

The only serious question, then, that arises is whether this contract is authorized by the Board of Railway Commissioners, or whether it needs authorization. The general provision of the law is contained in sec. 340 of the Railway Act: "That no contract, condition," and so on, "impairing or restricting or limiting the carrier's liability shall relieve the company from such liability, unless such class of contract, condition, by-law," and so on, "shall have been first authorized or approved by order or regulation of the board." The Board of Railway Commissioners for Canada, at a meeting held on Wednesday, the 17th of October, 1904, on the application of the Grand Trunk Railway and other railways, made an order permitting those railways to continue the use of their present forms until the board should otherwise prescribe and order; and the form is annexed, which I consider to be for the purposes of this action of the class, and therefore the defendant company are entitled to set up the contract.

The judgment accordingly can be for only the \$1,200, which is to include any amounts paid into Court.

From this judgment the plaintiff appealed to the Court of Appeal.

On November 18th, 1908, the appeal was heard before Moss, C.J.O., OSLER, GARROW, MACLAREN and MEREDITH, J.J.A.

E. D. Armour, K.C., and J. H. Campbell, for the appellants. The contract in question here is not binding on the plaintiff, so far as these defendants are concerned. It was for the carriage of the

stock over the New York, New Haven and Hartford railway so far as that railway extended, and must be limited to that line: *Parker v. Grand Trunk R.W. Co.* (1904), 3 O.W.R. 651; *Corby v. Grand Trunk R.W. Co.* (1905), 6 O.W.R. 81, 492. When the goods were delivered to the Grand Trunk Railway Company they should, if they desired to protect themselves, have made a special contract with the plaintiff. Under sec. 275 of the Railway Act of 1903, 3 Edw. VII. ch. 58, now sec. 340 of the R.S.C., 1906, ch. 37, all contracts of this kind must be approved of by the railway board, and without such approval cannot be enforced. A contract illegal by our law cannot be enforced, though legal, by the laws of a foreign country: *Rousillon v. Rousillon* (1880), 14 Ch.D. 351; *Re Missouri Steamship Co.* (1888), 42 Ch.D. 321. The English Act is somewhat different from ours. Under that Act no restriction is valid where the loss is occasioned by negligence: *Cohen v. South Eastern R.W. Co.* (1876), 1 Ex.D. 217, (1877), 2 Ex.D. 253. See also *Hughes v. Pennsylvania R.W. Co.* (1902), 202 Penn. St. R. 222, as to the law in force in Pennsylvania. The contract here has never been approved of by the board. The fact that it is in many respects similar to the contract produced, being the contract approved of by the board for use in Canada, is not sufficient. The contract itself must be submitted to and approved of by the board. The learned Chief Justice had no jurisdiction to determine whether it complied with the terms of the section. The exact form must be followed. It is not sufficient to be substantially the same. The cases under the Act relating to Short Forms of Conveyances, Bills of Sales Act, and similar Acts, shew what strictness is required in forms of this character: *Re Gilchrist and Island* (1886), 11 O.R. 537; *Delmatt v. Brown Bros.* (1905), 9 O.L.R. 351; Encyc. of Laws of England, vol. 2, p. 139; *Henry v. Armitage* (1883), 53 L.J.N.S.Q.B. 111. The letter from the secretary of the board attached to the contract, which stated that the contract had not been approved by the board, was clear evidence of such fact, and the learned Chief Justice should not have allowed such letter to be detached from the contract and the contract put in evidence without such letter. No freight rate was given to the plaintiff at the time of the shipment, nor is any rate

stated in the contract. This is most material, as the object is that the different rates should be laid before the plaintiff and an opportunity afforded him of deciding whether he would ship at the higher or lower rate. The plaintiff is therefore entitled to recover the full value of the stock injured.

G. F. Shepley, K.C., for the respondents. This was not a contract to take effect merely between the plaintiff and the New York, New Haven and Hartford Railway Company, but as between that company and the companies upon whose lines of railway the stock would necessarily have to be carried to reach its destination. This is not only the effect of the contract, but it is expressly so stated on its face. The agent had power to enter into the contract, and it enured to the benefit of all the connecting companies. The case of *Hall v. North Eastern R.W. Co.*, L.R. 10 Q.B. 437, is in point, and shews that the contract is to apply during the whole of the carriage. This case was considered and approved of in *Bicknell v. Grand Trunk R.W. Co.* (1899), 26 A.R. 401. There is nothing illegal in the contract. It is lawful according to the laws of Massachusetts, and one which the plaintiff could properly enter into there: *Squire v. New York Central R.W. Co.* (1867), 98 Mass. 239; *Graves v. Adams Express Co.* (1900), 176 Mass. 280. If approval by the railway board is required, the contract has been approved by the board. It is substantially the same as the contract in force in Canada, which has been approved of by the board. Section 340 does not give or require any special form to be used. All that it says is that they may enter into a certain class of contract providing for limitation of liability. The plaintiff knew what the different rates were, and what rate he would have to pay if he desired the companies to assume full responsibility. The plaintiff can therefore only recover the amount limited by the special contract: *Costello v. Grand Trunk R.W. Co.* (1906), 7 O.W.R. 846; *Robertson v. Grand Trunk R.W. Co.* (1895), 24 S.C.R. 611; *Squire v. New York Central R.W. Co.*, 98 Mass. 239. In the *St. Mary's Creamery Co. v. Grand Trunk R.W. Co.* (1904), 8 O.L.R. 1, which was based on the case of *Price v. Union Lighterage Co.*, [1904] 1 K. B. 412, all that was decided was that the company could not relieve themselves from liability altogether.

January 19, 1909. OSLER, J.A.:—The contract under which the plaintiff's horses were delivered to the New York, New Haven and Hartford R.W. Co. was a through contract for the carriage of a car-load of horses from Brockton, Mass., to Grimsby, Ontario, over that company's line and the lines of connecting carriers to the place of delivery.

By this contract the plaintiff declared and agreed that the horses had been received by the carrier for itself and on behalf of connecting carriers for transportation subject to the official tariffs, classifications and rules of the company, and upon certain expressed terms and conditions, which were admitted and accepted by the shipper as just and reasonable. One of such terms was that the shipper or consignee was to pay freight to the carrier at the rate of _____, which was the last published tariff rate, based upon the express condition that the carrier assumed liability on the said live stock, *i.e.*, horses, to the extent only of the agreed valuation, upon which valuation was based the rate charged for the transportation, and beyond which valuation neither the carrier nor any connecting carrier should be liable in any event, whether the loss or damage occurred through the negligence of the carrier or connecting carrier or their employees or otherwise. In respect of horses the valuation was not to exceed \$100 on each animal, and in no event was the carrier's liability to exceed \$1,200 upon any car-load.

By the contract the plaintiff also declared that he had the option of shipping the horses at a higher rate of freight, according to the official tariffs of the carrier and connecting carriers, but had voluntarily decided to ship them under the contract at the reduced rate of freight first mentioned.

For the loss of a car-load of horses destroyed during their carriage in a collision caused by the admitted negligence of the defendants, one of the connecting carriers, this action was brought. The defendants pleaded the contract as exempting them from liability beyond the stipulated sum. The value of the horses was found to be \$16,000, but the learned trial Judge held that the plaintiff was bound by the terms of his contract, and that

he could recover no more than \$1,200, for which sum he gave judgment.

The plaintiff appeals, contending that the condition is not binding upon him.

According to the principles laid down in *Hall v. North-Eastern R. W. Co.*, L. R. 10 Q. B. 437, applied and acted upon in this Court in *Bicknell v. Grand Trunk R. W. Co.*, 26 A. R. 431, where the authorities on the subject are cited, the defendants, as connecting carriers are, speaking generally, entitled to rely upon the terms and conditions of the contract made with the first carrier, under which the property in question was delivered and received for through transportation and carriage.

In *Robertson v. Grand Trunk R.W. Co.* (1894), 21 A.R. 204, S.C., 24 S.C.R. 611, sec. 246 (3) of the Railway Act of 1888, 51 Vict. ch. 29 (D.), was considered. That section provided that every person aggrieved by any neglect in the premises—i.e., neglect in the carriage and transporting of goods received for carriage—should have an action therefor against the company, from which action the company should not be relieved by any notice, condition or declaration if the damage arose from any negligence or omission of the company or its servants.

It was held that this clause did not prevent a railway company from entering into a special contract for the carriage of goods limiting its liability as to the amount of damages to be recovered for loss of or injury to such goods arising from negligence.

"The distinction made was between the contract for exemption from all liability and one fixing or limiting the amount of damages beyond which no claim could be made or recovered in any case whatever, including cases of negligence:" *per MacLennan, J. A.*, in *St. Mary's Creamery Co. v. Grand Trunk R.W. Co.* (C.A.), 8 O.L.R. 1, 4. In that case, as in *Vogel v. Grand Trunk R.W. Co.* (1884), 10 A.R. 162, S.C. (1885), 11 S.C.R. 612, the contract was held to be one for complete exemption from liability, and was, consequently, invalidated by the express language of the section.

Unless, therefore, the provisions of more recent legislation

make a difference, *Robertson's* case is an authority in favour of the defendants, and the plaintiff cannot recover more than the agreed value of the goods.

The Railway Act of 1903 is now consolidated in the Revised Statutes of Canada, ch. 37, which was in force when the contract in question was made.

"Company" means a railway company; "traffic" means the traffic of passengers, goods and rolling stock: sec. 2, (4a) and (31). And the Act applies (subject as therein provided) to all persons, companies and railways, other than Government railways, within the legislative authority of Parliament: sec. 5.

Section 284, under the heading, "Accommodation for Traffic," enacts that the company shall, according to its powers, furnish at the place of starting and at the junction of the railway with other railways, and at all stopping places established for such purpose, adequate and suitable accommodation for the receiving and loading of all traffic offered for carriage upon the railway, and without delay and with due care and diligence receive, carry and deliver all such traffic.

Sub-section 7. "Every person aggrieved by any neglect or refusal of the company to comply with the requirements of this section shall, subject to this Act, have an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration if the damage arises from any negligence or omission of the company or of its servants."

This clause is substantially the same as sec. 246 (3) of the Act of 1888, and, except in so far as it is controlled or qualified by the words "subject to this Act," it must, following the *Robertson* case, be held that it does not prevent the shipper and the company from contracting for a limited liability, even in the case of negligence on the part of the latter, if nothing is to be elsewhere found in the Act restricting their power to do so.

The plaintiff relies on sec. 340 as the qualifying clause, and contends that, notwithstanding the contract, the defendants are liable for the full value of the horses because the contract has not been approved by the Board of Railway Commissioners. This

section enacts that "no contract, condition, by-law, regulation, declaration or notice made or given by the company impairing, restricting or limiting its liability in respect of the carriage of any traffic, shall, except as hereinafter provided, relieve the company from such liability, unless such class of contract, condition, by-law, regulation, declaration or notice shall have been first authorized or approved by order or regulation of the board."

2. The board may in any case or by regulation determine the extent to which the liability of the company may be so impaired, restricted or limited.

3. The board may by regulation prescribe the terms and conditions under which any traffic may be carried by the company.

The provisions of this section must be read with those of sub-sec. 7 of sec. 284. It is the section, or one of the sections, to which the latter section is made subject. Section 340 was the only section expressly referred to on the argument, but the other was not overlooked, as the case was argued as if, subject to sec. 340 (sec. 275 of the Railway Act of 1903), the law remained as decided by the *Robertson* case, which was cited by the respondents, in which the power to restrict, impair or limit the liability as regarded the amount of damages recovered, even in cases of negligence, was affirmed. We must take it that Parliament was aware that notwithstanding the provisions of sec. 246 of the Railway Act of 1888, this had been so held, and that they intended by sec. 340 of the present Act to qualify the rights of the shipper and the railway company in this respect, and to declare that, unless authorized by the Board of Railway Commissioners, no contract, condition, declaration or notice limiting liability should be valid, but that if and to the extent to which such a class of contract was affirmed by the board it should stand good.

Whether sec. 340 confers upon the board power to authorize the railway company to adopt a form of contract exempting them from liability in cases of negligence it is not necessary to decide. It does not in terms purport to do so, and it may stand

quite consistently with the earlier section, the predecessor of which had already in *Robertson's* case, where the conditions of the contract were in the same terms as those in the present case, and where the loss had occurred through negligence, been construed as not disabling the company from contracting for the limitation of the amount of damages recoverable in such a case. Section 340 now prevents them from doing that unless the board has authorized such a class of contract. The words, "subject to this Act," in sec. 284 (7), must have some meaning given to them if possible, and the only section of the Act to which they naturally relate is sec. 340. That section does not purport to empower the board to authorize a contract which absolutely relieves the company from liability in the case of negligence. It provides only that no contract, etc., impairing, restricting or limiting liability shall relieve them unless such class of contract has been authorized or approved by the board, and the question is whether the contract on which the defendants rely is valid under the section.

I am of opinion that it is.

On the 17th of October, 1904, on the application of the defendants and of other Canadian railway companies for the approval of their form of bills of lading and other traffic forms, the board made an order, in pursuance of sec. 275 of the Railway Act of 1903, now sec. 340 of the Revised Act, permitting the applicants to continue the use of their present forms until the board should otherwise order. One of the forms approved is a form of "Live Stock Special Contract," which contains a clause by which a shipper, accepting a lower specified rate of transportation charges, agrees that the company's liability for loss or damage to individual animals or for a car-load shall in no case exceed certain specified sums of the same amount as those mentioned in the contract now in question. In effect, the restriction clause in the contract, although differently expressed, is the same as that of the form authorized by the board. In some other respects there are differences between them, which, however, in the view I take of the meaning of the section, are not impor-

tant. I construe the words, "unless such class of contract is authorized or approved by the board," as meaning unless the board authorizes or approves, not necessarily of the whole terms of any particular contract of carriage, but of the general use of a contract containing a provision restricting or limiting the company's liability; in other words, unless the board approves of the principle of a contract of that class or kind.

This the board has certainly done by its order of the 17th October, 1904, and, if sec. 340 applies to the case of a contract made with a foreign railway company, involving the carriage of traffic by means of the connecting lines of different companies to a point in Canada, the class of contract into which the plaintiff entered has been approved and the condition is binding. But, as the authority of the board extends only to persons, companies and railways within the authority of Parliament, it may, perhaps, be doubted whether the section extends to a contract with a foreign railway company under which traffic is carried into or through this country by means of another and connecting railway. Section 336 provides *inter alia* that, as respects all traffic which shall be carried from any point in a foreign country into Canada by any continuous route owned or operated by any two or more companies, whether Canadian or foreign, a joint tariff for such continuous route shall be filed with the board, but nothing that I can see in the Act contemplates a new contract being entered into between the consignee and the Canadian railway company which receives the goods from the foreign railway company for the purpose of carrying them on to their place of destination here. Indeed, sec. 337, which provides for the carriage being continuous to that place from the place of shipment, looks the other way. However, upon this point I express no final opinion.

Whether, therefore, sec. 340 applies or not to such a case as the present, the action must fail. If it does, the class of contract limiting liability under which the goods were carried has been approved. If it does not, the plaintiff has executed such contract, and *ex proprio vigore* is bound by its terms. I note sec. 306 (4)

merely to shew that it has not been overlooked. It seems to refer to proceedings under such Acts as the Fatal Accidents Act or the Workmen's Compensation Act or other provincial laws.

I refer also to *Hayward v. Canadian Pacific R.W. Co.* (1906), 16 Man. L.R. 158, 6 Can. Ry. Cas. 411; *Mercer v. Canadian Pacific R.W. Co.* (1908), 17 O.L.R. 585; and *Sheppard v. Canadian Pacific R.W. Co.* (1908), 16 O.L.R. 259; *Booth v. Canadian Pacific R.W. Co.* (1906), 5 Can. Ry. Cas. 389; *Costello v. Grand Trunk R. W. Co.*, 7 O. W. R. 846, where the sections 284 (7) and 340 were considered.

Appeal dismissed with costs.

MACLAREN, J.A.:—Three questions may be considered on the present appeal. First, whether, on a proper construction of the contract entered into between the plaintiff and the New York, New Haven and Hartford Railroad Co., at Brockton, for the limitation of liability on the horses in question to \$1,200, such limitation was valid, and would have been applicable to the circumstances of this case if the accident had occurred on that company's line, and there were no statutory difficulty such as that referred to in question three. Second, whether the contract is applicable to the Grand Trunk R.W. Co. at all, even when carrying the horses over part of the State of Vermont. And, third, if so, is it invalid in Canada on account of the provisions contained in secs. 284 and 340 of the Dominion Railway Act, R.S.C. 1906, ch. 37?

First, as to the contract itself. It is a special one, and is called a "Live Stock Contract," and provides that the company only assumes liability on the basis of an agreed valuation of \$100 for each horse and not more than \$1,200 on any car-load, and that the carrier shall not in any event be liable for more.

Such cases as *Price v. Union Lighterage Co.*, [1904] 1 K.B. 112, and *The Pearlmoor*, [1904] P. 286, shew that where, as here, the damage is caused by the negligence of the carrier or his servants, such restrictions will not be held to apply unless special words are used to make it clearly appear that such negligence

was meant to be covered. The contract signed by the plaintiff in this case provides that such shall be the limit of liability, "whether the loss or damage occurs through the negligence of the said carrier or connecting carriers or their employees or otherwise." Moreover, the plaintiff was familiar with such contracts, and must be held to have been aware of the terms of the contract he was making.

As to the second question, the contract was a single one for transportation from Brockton to Grimsby. The plaintiff was well aware that the New York, New Haven and Hartford Co. only ran to Boston, and that the rest of the distance the horses were to be carried by three companies, of which the Grand Trunk was the last, and the contract formally declared that the contracting company was acting not only for itself, but also on behalf of the connecting carriers. The fact that each of these companies in turn took over the car with the horses shews that they recognized and adopted the act of the first company in so contracting on their behalf. The defendants and the other companies became what Blackburn, J., in *Hall v. North Eastern R.W. Co.*, L.R. 10 Q.B. 437, at p. 441, calls sub-contractors, and assumed the burdens and became entitled to the benefits of the original contract. Indeed, even if there had not been the express mention of these subsequent carriers in the contract, it would, in the circumstances of this case, have been held to be implied, as it was in the *Hall* case, as it was clearly in the contemplation of both parties. To this effect is also the decision of this Court in *Bicknell v. Grand Trunk R.W. Co.*, 26 A.R. 431.

The third question is the only one that really presents any difficulty. It is not a case like *Vogel v. Grand Trunk R.W. Co.*, 11 S.C.R. 612, or *St. Mary's Creamery Co. v. Grand Trunk R.W. Co.*, 8 O.L.R. 1, where the question was as to the validity of a contract for exemption of the carrier from all liability in cases of negligence. It was there held that sections in the Railway Acts of 1879 and 1888 respectively almost identical with sub-sec. 7 of sec. 284 of the present Railway Act prevented the company from obtaining the benefit of a clause stipulating for exemption from all liability in a case of negligence.

The question in this case is not the exemption from all liability, but whether the extent of the liability of the company can be restricted or limited at all by agreement, the same as that in *Robertson v. Grand Trunk R.W. Co.*, 24 S.C.R. 611. There it was held that the *Vogel* case did not apply, the Chief Justice saying, at p. 616, that "nothing there (in the *Vogel* case) decided that it was not competent to the respondents (the company) to enter into an agreement for pre-ascertained damages, or for limited liability, if that term is preferred. The sub-section—246 (3)—which is invoked by the appellant (*Robertson*) is worded as follows: 'Every person aggrieved by any neglect or refusal in the premises shall have an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or its servants.' This is an enactment which ought not to be extended beyond its literal meaning, and that is plainly confined to the prohibition of any contract relieving the company from liability for negligence. To say that it is to shut out the company from liability for damages by an agreement fixing a value on goods carried would be to extend its language by implication to a case which does not appear from any part of the Act itself to have been within the contemplation of the legislature."

According to sec. 284 of R.S.C. ch. 37, which applies to the present case, the duty of the company was "without delay, and with due care and diligence to receive, carry and deliver" the horses in question; and sub-sec. 7 provides that "every person aggrieved by any neglect or refusal of the company to comply with the requirements of this section shall, subject to this Act, have an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration if the damage arises from any negligence or omission of the company or of its servants."

It will be seen that the language of this sub-section is almost identical with the sub-section from the Act of 1888 quoted by the Chief Justice of the Supreme Court in the *Robertson* case,

and all that was said by him in that case would apply equally to this, subject to one qualification, viz., that sec. 340 of the present Act was not in the Act of 1888, and by the added words, "subject to this Act," its provisions and effect must be considered.

Section 340 reads as follows: "No contract, condition, by-law, regulation, declaration or notice made or given by the company impairing, restricting or limiting its liability in respect of the carriage of any traffic, shall, except as hereinafter provided, relieve the company from such liability, unless such class of contract, condition, by-law, regulation, declaration or notice shall have been first authorized or approved by order or regulation of the board.

"2. The board may in any case or by regulation determine the extent to which the liability of the company may be so impaired, restricted or limited.

"3. The board may by regulation prescribe the terms and conditions under which any traffic may be carried by the company."

We find that the Dominion Railway Commissioners, being the board referred to in this section, did, on the 7th of October, 1904, authorize a form of live stock contract whereby the Grand Trunk Railway might limit its liability, and when the destination was beyond its own lines, it might act as agent of the owner or shipper in handing over the stock to connecting carriers, which were also to have the benefit and protection of the contract.

It was not claimed before us that in this order the board had exceeded its powers.

While the present contract is not an exact copy of the one so authorized and approved, they are substantially the same, and belong to the same class, so that in this respect the present contract comes literally within sec. 340.

There remains, then, only the question whether that part of the contract stipulating for the limitation of damages when caused by the negligence of the company's servants can be upheld. Any difficulty as to the statute being removed, the present case is governed by the decision of the Supreme Court in the *Robertson* case, which we should follow, and the appeal must be dismissed.

MEREDITH, J.A.:—There seems to me to be no sort of doubt that, under the order of the Board of Railway Commissioners for Canada, the respondents were authorized to limit their liability by contract, as it was limited in this case.

By the contract in question, liability, of not only the contracting company, but also of any connecting carrier, was so limited; and the contracting company obviously had power to make such a contract for the respondents.

The only debatable ground, as it seems to me, upon which the plaintiff could have based his claim, has been throughout ignored or undiscovered by him, even upon this appeal, though the point was more than once suggested.

That point is whether, having regard to sub-sec. 7 of sec. 284 of the Railway Act, the defendants could, under any circumstances, limit their liability, in such a case as this, arising out of their negligence. Prior to that enactment assuming its present form, according to the cases, they could not have exempted themselves from all liability: *St. Mary's Creamery Co. v. Grand Trunk R.W. Co.*, 5 O.L.R. 742, and on appeal, 8 O.L.R. 1; but could have limited their liability as they have done in this case: *Robertson v. Grand Trunk R.W. Co.*, 24 S.C.R. 611.

The effect of the present enactment, in some such respects, has been considered in the Manitoba case of *Hayward v. Canadian Pacific R.W. Co.*, and in the Ontario case of *Mercer v. Canadian Pacific R.W. Co.*, in a Divisional Court, and has been observed upon in another Ontario Divisional Court in the case of *Sheppard v. Canadian Pacific R.W. Co.*, 16 O.L.R. 269; but, as the parties have not in any manner raised any such question in this case, and as it has not been discussed at any stage of it, I cannot see how it can rightly be considered now. The point is an important one, and one upon which I must decline to express an opinion until it has been properly raised and has been argued: see *Eyre v. Highway Board of the New Forest Union* (1892), 8 Times L.R. 648.

I can see nothing for it but to dismiss the appeal.

MOSS, C.J.O., and GARROW, J.A., concurred.

CONTRACT—EXEMPTION FROM LIABILITY.

QUEBEC.]

[SUPERIOR COURT.]

ALEXANDER V. CANADIAN PACIFIC R.W. Co.

(Q.R. 33 S.C. 438.)

Common carriers—Liability for damage to goods carried—Stipulation exempting from liability strictly construed—Description “brittle and fragile objects” not to apply to wooden cheese boxes—Liability of carrier for fault in cases under exemption clause—Proof of fault by excessive percentage of goods damaged.

Held, common carriers, as the insurers of the goods entrusted to them, are liable for loss of, and damage to them. Stipulations in contracts for the carriage of goods and in bills of lading, exempting the carrier in from liability in certain cases, are construed strictly. Wooden cheese boxes do not come under the description, in such a stipulation, of “*brittle and fragile objects*,” especially when it appears at the end of a long enumeration of objects wholly dissimilar. Supposing, however, the clause to apply, the carrier would still be liable for damage proved to be caused by his fault, and such fault is established, as to one shipment of cheese in wooden boxes, by shewing that 11% of the boxes were damaged, with the additional proof that the average number damaged, in ordinary shipments in the cheese trade, is only 5%.

February 21, 1908. ARCHIBALD, J.:—The plaintiff’s action demands from the defendant the sum of \$115.20, for damages caused to cheese boxes carried by the defendant for the plaintiff from the 28th May to the 23rd November, 1904. The plaintiff specifies the number of boxes that were damaged as 1,152, and it appears, that the total number of boxes contained in the shipments referred to in the declaration, was 9,888, which makes 11.6% of the boxes of cheese contained in those shipments, which arrived in a broken condition. . . . The plaintiff contends that these boxes were broken by the careless and negligent handling of the defendant.

The defendant denies the plaintiff’s allegations and alleges that they handled them in the most careful manner, and if the boxes were broken, it was due to the insufficiency of the boxes themselves to carry the cheeses which they contained, or to defects of the boxes, or the careless packing of the cheese in the boxes, and not to any fault of handling on the part of the defen-

dant. The defendant further pleads that by a condition of their bill of lading, exemption for damage to brittle objects was stipulated, and that the cheese boxes in question were brittle objects, and that the defendants are not responsible under that stipulation of the bill of lading. The defendant further pleaded, that by a clause of the bill of lading they were entitled to notice, within thirty-six hours, of any claims for damages, and that they received no such notice. The 9,888 boxes of cheese mentioned in the bill of lading, out of which 1,152 of the boxes arrived in a damaged condition, were not the only boxes of cheese which were carried by the defendant, for the plaintiff during the season in question. The probability is that they did not constitute more than one tenth of the boxes carried, but although it appears by the evidence of the plaintiff, that there were some damaged boxes outside of those claimed for, yet they were of so slight importance as not to justify a claim for damages. This fact is, perhaps, of some importance, when we shall come to appreciate the proof of negligence.

I find, upon making an analysis of the plaintiff's account, that selecting from the different shipments, as appears by the bill of lading, those where the breakage of boxes exceeded 10%, there were out of the 9,888 boxes, 2,665, and where the breakage was less than 10%, 7,223. The total breakage out of the 2,665 boxes was 801, making an average of 30%, the total breakage of the remaining 7,223 was 351, making an average of 4.85%.

A large number of witnesses was examined, of persons expert in the cheese business, and it results from their testimony that a certain amount of breakage in cheese boxes always happens, but no witness, either for the plaintiff or the defendant, places that inevitable amount higher than 5%, others of them, saying from 3 to 5%.

It may be said at once, that the plaintiff has not found it possible to trace the cause of the breakage of the boxes in question to any specified cause, so that the evidence of course must be more or less inferential; it does appear, however, that an

enormous business in cheese carried by railway companies is done annually, and in boxes of substantially similar character to those which are in question in this cause.

It is also proved, I think satisfactorily, that a cheese box containing cheese which entirely fills the box and carried in in a railway car, without being allowed to fall either within the car, or at either terminal point, will arrive in a sound condition. It is also proved, that if a box containing cheese be overthrown and allowed to fall, even for a short distance, either by concussion in shunting, or by slipping from the hands of the person carrying it; that it will in all probability break. It seems to me also fairly established, that a box which is not entirely filled with cheese placed under a number of other boxes, and subjected to inevitable shocks by the shunting of the cars, and their running over the railway, may be split or broken.

It is also proved that boxes, although generally similar in construction, may have individual defects in some cases, which might pass unnoticed. Is then a cheese box a brittle and fragile object which would be included in the exemption from liability contained in the bill of lading?

Some effort was made in the course of the evidence, both on one side and on the other, to shew that cheese boxes were so regarded; and, speaking generally, the evidence seems in fact to support both positions. In the first place, it is proved that hardly a shipment of cheese arrives without some damage to one or more boxes, and, notwithstanding that fact, claims for damage to cheese boxes have been made in very few cases indeed.

On the other hand, it sometimes happens that a very large proportion of the boxes are broken and perhaps the contents more or less damaged, in which case, claims have been made, and have been paid by the railway companies, including the boxes destroyed, and no recourse has been had by the railway companies, to the alleged exemption as to brittle objects. Although the apparent acquiescence of the cheese trade in receiving their cheese from the railway company, with the boxes

damaged, is explained by the trifling interest which is involved and the cost of the keeping track of, and claiming damage for the ordinary small proportion of broken boxes. I do not find it necessary to discuss at length the question as to whether cheese boxes would be covered by the condition stipulating non-liability for damage to brittle objects. But it is to be borne in mind that the defendant, being an insurer of the goods, unless relieved by special contract, such contract would be narrowly interpreted. The expression "brittle" is a general one appearing at the end of a long special enumeration of objects, wholly dissimilar from cheese boxes, and would probably, by the application of the maxim "*noscitur a sociis*," not be held to cover cheese boxes.

Even supposing, however, the clause of the bill of lading in question did cover such objects as cheese boxes, the exemption therein stipulated would not apply in the case where the breakage had occurred through the fault of the company. Now, as is well stated in an article of our Code, fault is not presumed and must be proved, but on the other hand, we have a well-known provision of law applied to carriers which seems to adopt, with respect to them, the contrary principle, that is to say, carriers are insurers of the goods which they accept for carriage, and are obliged to deliver them to the consignee, in like good condition as received, thus if goods arrive in a damaged condition, the carrier is responsible, without proof of fault. Starting from that principle, and applying the exemptions which the carrier stipulates, we find that they must be interpreted strictly against the carrier, because he is *primâ facie* liable, and because he himself prepares the clause stipulating exemption, and must, consequently be bound by the strictest interpretation.

As I have said before, there is no specific proof of negligence in the present case, but there is proof that the cheese boxes, which arrived broken, would have arrived safe, unless some external force of a character not essential to the carriage of the goods, had been applied to them. The Court is so far entitled to take into consideration the laws of nature. The fact which, as I

have above said, has been proved, that cheese boxes always arrive with some damage, does not indicate that the cheese boxes are in themselves insufficient to carry the goods which are placed in them. Certainly 95% and probably more than 95% of the boxes arrive in perfect order, those which are broken are certainly, in most cases, just as strong as others which arrive safely. The difference arises in the extent of external force that has been applied to the one or to the other.

The plaintiff in this action as a witness, refers to his experiences in handling such goods upon the railways, himself, and indicates that, habitually, boxes are thrown from greater or less distances. One of the freight handlers of the Viger station, examined on the part of the defendant, describes the manner in which cheese boxes were taken from the cars and carried into the store room of the company on trucks; and his description impressed me as rendering exceedingly probable the occasional overthrow of the boxes of cheese.

A railway company who accepts goods for carriage is obliged to take such care of those goods as their nature demands. For example: it has been held that a railway company transporting butter during the summer is obliged, without special contract, to provide refrigeration for the butter. A railway company is also obliged to handle goods of a fragile nature in such a way as not to destroy them; so, if the cheese boxes in question are fragile, the railway company was obliged to provide extra precautions, in order that they might be safely carried. In absence of specific proof of fault, does there exist in this case such inferential proof as would justify the Court in finding fault on the part of the defendant?

In two cases, in one of which eighty-two boxes were concerned, and in another, fifty, the whole of the boxes were broken. It is scarcely conceivable that this result could have happened, unless some unusual circumstances not necessarily incident to the carriage of the goods, a circumstance which must have been within the knowledge of the defendant, but could scarcely be within the knowledge of the plaintiff, had occurred.

I am of opinion that where it appears by proof, and may be inferred by a knowledge of the laws of nature, and is proved by actual practice, that the cheese boxes were sufficient to carry their contents, with careful handling, and it further appears that in other cases large numbers of the boxes arrived in a broken condition, and it has been established that these broken boxes were equally strong and good as those that arrived safe, that it is proper to infer that the cause of the breakage arose out of the application to these broken boxes of some force to which they would not have been subjected, had they been handled with that care and attention, which that railway company was obliged to bestow. It is probable that in a large number of cases, the breakage takes place during the loading of the car and when the loading has not yet been completed. The railway company, habitually, in small places, puts the car on the siding, and allow the farmers to load the cheese into it themselves, without oversight. Then, when the cheese train arrives, it is backed on the siding and picks up the car. Doubtless in many cases, the cars come together with a very considerable shock, and if the cheese has been piled up in rows, it may be probably overthrown. If anything of that kind happened, doubtless it would be fault in the company, for, in the first place, it is the duty of the company to see that the goods, in these cars, are properly stowed, and, in the second place, not to allow the cars to come together with such force as to injure their contents.

Another suggested cause of breakage, is, that sometimes the box may be a little larger than the cheese and particularly that the cheese may not be quite as high as the edge of the box, and when a box so packed happens to be in the bottom of a row of boxes, the weight of the other boxes upon it is too great for the strength of the under box, unsupported by the cheese which it contains.

There is no actual proof of breakage resulting from that cause, that is only suggested as a probable cause of breakage. On the other hand, it is proved, that it is the duty of the manufacturers of cheese, when they put cheese into a box, to trim down the

edge of the box, if it is too high, so that the lid will rest upon the top of the cheese.

On the whole, I am of opinion, that upon all the proofs in the case, breakages so serious as those which occurred in many of the cases referred to in the plaintiff's statement, could not have occurred without the fault of the defendant, or its employees, and that the stipulation of exemption from liability contained in its bill of lading does not cover the case where the damage has resulted from the defendant's own negligence.

In a case of the *Glengoil Steamship Company v. Pilkington*, 28 S.C.R. 140, there is to be found a *dictum* of Mr. Justice Taschereau delivering the judgment of the Court concerning the legality of a clause in a bill of lading, exempting the carrier from liability for negligent acts, but as this *dictum* did not form an element in the judgment, it is still permissible for this Court to discuss it.

The *dictum* referred to article 1676, of the Civil Code which is in the following language: "Notice by carriers of special conditions limiting their liability is binding only upon persons to whom it is made known and notwithstanding such notice and the knowledge thereof, carriers are liable whenever it is proved that the damage was caused by their fault or the fault of those for whom they are responsible."

Judge Taschereau, commenting upon that article, put the question: "Is a condition in a bill of lading, stipulating that the owners will not be responsible for the negligent acts of the master (of the ship), illegal and void?" and he answered as follows: "Far from prohibiting this contract, this article 1676 implies that it is a perfectly licit one, it certainly does not take away the right to expressly agree to a limitation of those liabilities. On the contrary, it impliedly admits it, for if it did not exist, this enactment as to notice, would altogether be a superfluous one. It merely enacts that there will be no implied contract from a notice limiting a carriers' liability, even when that notice is known to the shipper, so that without an express con-

tract, the full liability of the carrier must be given effect to, notwithstanding such a notice and knowledge thereof by the shipper."

These remarks do not appear to me to be justified by a true interpretation of the article in question. That article, so far from providing that a notice upon a bill of lading limiting liability, and the knowledge of that notice on the part of the shipper of goods receiving the bill of lading, does not amount to a contract between the carrier and the shipper, provides the very contrary. It does say in effect, that when a shipper offers goods to a carrier, for carriage, and the carrier has given to the shipper a bill of lading, exempting himself from liability for loss or damage to such goods, and such condition has been called to the attention of the shipper, who accepts the bill of lading, and trusts the carrier with the goods, that the shipper is bound, by the condition in question; that is to say, that the delivery to the shipper of the goods, by the carrier, of the bill of lading containing the condition of non-liability, and the knowledge of the shipper of such condition, constitute an implied contract between the parties. But the article goes on further to say, that notwithstanding such contract, the carrier will still be liable, where the shipper proves that the damage resulted from the carrier's fault.

The question as to whether the carrier can validly make a stipulation in a bill of lading, exempting himself from liability for damage caused by his own fault, does not arise, in the present case, because the clause in question, upon the bills of lading produced, makes no mention of damage caused by the carrier's fault, but only a general exemption from responsibility for damage, to certain classes of goods. So that whether the interpretation of Mr. Justice Taschereau, of article 1676, be valid or not in the present case, there can be no doubt, that such a stipulation as the bills of lading contain, does not provide the carrier with a defence against an action of damage, caused by his own fault. It may be pointed out, that the *Glengoil Steamship Company case*, lays down the principle, that in the interpreta-

tion of conditions in a bill of lading, exempting the carriers from liability, a very narrow construction will be resorted to.

In that case, the Court held, that fault as to the stowage of goods in the steamship, was not covered by the condition, that: "Glass is carried only on condition that the ships and railway companies are not liable for any breakage that may occur, either from the negligence, rough handling or any other cause whatever."

Mr. Justice Taschereau, in that case, said that as the clause in the Canadian Railway Act was taken from the like Act in force in England, the English jurisprudence, in relation to that clause, had to be followed in its interpretation.

Doubtless that position is sound, in so far as it may appear that the Canadian Act is intended to closely follow the Imperial Acts.

I think, however, that upon comparison of the two legislations, an important difference will be found. The Imperial Act, as far as it needs to be referred to, may be found in the 17th and 18th Victoria, ch. 31, sec. 7, "Imperial." That section 7 commences as follows: "Every such company as aforesaid, shall be liable for the loss of, or for any injury done to any horses cattle or any other animal, or to any goods, articles or things, in the receiving, forwarding or delivering occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition or declaration made and given by such company, contrary thereto, or in any wise, limiting such liability; every such notice, condition or declaration being hereby declared to be null and void, provided always that nothing herein contained shall be construed to prevent the said companies from making such conditions with respect to the receiving, forwarding and delivering of any of the said animals, articles, goods or things, as shall be adjudged by the Court or Judge before whom any question relating thereto, shall be tried, to be just and reasonable."

Here follows, in the same section, a number of conditions,

concerning matters quite distinct from the clause above cited and finally, towards the end of the section, is inserted the following: "Provided also that no special contract between such company and any other parties respecting the receiving, forwarding or delivering of any animal, articles, goods or things, as aforesaid, shall be binding upon, or effect any such party, unless the same be signed by him or by the person delivering such animals, articles, goods or things respectively for carriage."

When we compare the Canadian Railway Act, with the clause above cited, we find very considerable difference, section 20, Railway Act of 1868, 31 Vict. ch. 68, sec. 20, sub-secs. 2, 3 and 4, are as follows: "The trains shall be started and run at regular hours to be fixed by public notice, and shall furnish sufficient accommodation for transportation for all passengers and goods as are within a reasonable time previous thereto offered for transportation, etc."

Section 3: "Such passengers and goods shall be taken, transported and discharged at, from and to such places on the due payment of the toll, freight or fare, legally authorized therefor."

Section 4: "The party aggrieved by any neglect or refusal in the premises shall have an action therefor against the company."

By the 34th Vict. ch. 43, sec. 5, the following is added to subsection 4 above cited: "From which action the company shall not be relieved by any notice, condition, or declaration if the damage arises from any negligence or omission of the company or of its servants."

It is seen that the Canadian Act omits all reference to the limitation of the company's liability in virtue of what is called in the Imperial Act, a special contract. Notwithstanding the necessity of interpreting the Imperial Act, so as to give due effect to both of the clauses relating to limitation of liability which I have above cited, a case arose and came before the House of Lords in 1863, of *Peek v. The Directors of the Staffordshire R.W. Co.*, 10 H.L.C. 473, in which it was held that the clause concerning limitation of liability by special contract, was to be

interpreted as subject to the previous clause, making conditions only binding, in so far as they were held by the Court, to be just and reasonable.

Mr. Justice Blackburn, in *Peek's case*, most exhaustively discussed the whole matter, he admitted that the peculiar construction of section 7, the separation of the clause relating to the contract from the remainder of the similar matter contained in the section, presented a difficulty. He commenced by citing Lord Coke's rules for the interpretation of a statute as follows:

1st. What was the common law, before the making of the Act?

2nd. What was the mischief and defect for which the common law did not provide?

3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth?

4th. The true reason of the remedy; and then the office of the Judges is always to make such construction as shall suppress the mischief and advance the remedy.

Mr. Justice Blackburn then went through every case which had been decided, in relation to the limitation of carriers' liabilities, by condition or special contract, up to the passage of the Imperial Act, and he established, beyond controversy, that up to that time, by jurisprudence which had become settled, carriers could exempt themselves from responsibility for damage or loss of goods carried, even when such damage or loss arose out of their own fault or negligence. Having then established what the law was, he proceeds to shew what was the defect which existed in the law as previously administered, and he came easily to the conclusion, that it was an abuse that railway companies should have the power to exempt themselves from liability for damage caused by their own fault.

Indeed the only substantive section of the Act in question is that which has been in part above cited. The other clauses referred to questions of interpretation and administration of the 7th section. Thereupon the learned Judge proceeds to in-

interpret the clauses which I have cited, so as to give them such an effect as will advance the remedy intended to be promoted. He therefore concludes, by the examination of a large number of cases, that the words *notice, condition or declaration* contained in the first part of the section meant only such notices as became effective between the shipper and the company by way of contract. On page 506 of the report of the 10th House of Lords' cases, of (*Peek's case*) Mr. Justice Blackburn cites a case where a railway company had served notices upon a number of fishermen, that they would not carry fish except upon certain conditions. The plaintiff afterwards delivered to the company certain fish to be carried, which were lost, and the plaintiff sued for damage, and the defendant pleaded the notices in question. The jury found that there was a special contract, and the Court held that the jury was right and the judgment dismissing the action was maintained.

On the same page, the Judge sums out the result of all the cases which he has reviewed as follows: "Now, if this be a correct statement of the authorities before 1854 (and I am not aware that I have omitted anything), we find that by the express enactment of the legislature 2 Geo. IV., and 1 Wm. IV., ch. 68, no public notice or declaration could as such, in any way affect the liability of a carrier as regards goods in general, though special contracts might be made as at common law, and it had been decided that such notices and declarations when brought home to the customer did operate as being the basis of a special contract to carry, on the conditions contained in such notices. It had also been decided that such conditions thus made part of a special contract, were binding, even when protecting the company from responsibility for all loss or injury however caused. It had farther been decided that a special contract had to be inferred from the act of a party sending goods after the receipt of a notice, even where the party protested against the notice. And this state of law, it was alleged by many persons, was taken advantage of by railway companies who had a prac-

tical monopoly of the carriage of goods, and it was alleged, abused their advantage so as to evade altogether the salutary policy of the common law."

I need further only say that in *Peek's case*, the majority of the Judges (in fact nearly all) interpreted the section in question not as denying that the effect of notices, conditions or declarations to limit the liability of the carrier were of force as implied contracts, but on the contrary, affirming that the only force they could possibly have was from the point of view of contract. If we look at the Canadian Railway Act, the difficulties of the question do not arise at all. The provision relating to special contract is wholly omitted. More particularly, when we look at the article 1676 of our own Code, the words, "notice and declaration," are entirely omitted, and we have in their place, "notice by carriers of special conditions limiting their liability, is binding only upon persons to whom it is made known." In the interpretation of that article, it seems to me impossible to find any other basis of limitation than the implied consent of the shipper who delivers goods, with a knowledge of the conditions upon which the carrier is willing to carry them. The article says, "the notice is binding, etc.," that is to say, produces an obligation. If we look at article 983 of the Code, we find that obligations arise from contracts, quasi-contracts, offences, quasi-offences, and from the law solely. It is plain that in the case in question, none of these enumerations have any application, except that of contracts, so that the distinction taken in the *Glengoil case*, between notices, conditions and special contracts is, it appears to me, wholly inapplicable to our statute.

As I have said, in the *Glengoil case*, the language of the learned Judge, to whom reference has been made, appears to be a discussion of the interpretation of the Canadian Railway Act, on the assumption, that it was similar to the 17th and 18th Victoria Imperial.

Probably the law relating to carriers would form part of the English commercial law and would therefore become the law of

Canada, at the date of the cession of this country to England, as such law existed at that date. I find a case reported in the 4th Burrows' Reports, which indicates very clearly what the English common law relating to carriers, was at the time when that common law became the law of this country. The case is *Gibbon v. Paynton*, 4 Burr. 2298. That was a case where a merchant in Birmingham had entrusted a hundred pounds in money to a stage coachman to be carried to London. The money was brought to the stage coachman, hidden in hay, in an old nail bag, and no information whatever was given to the carrier of the existence of the money. The coachman had previously advertised in the newspapers that he would not be responsible for money, unless he had notice that money was being carried, and the jury found that the plaintiff had received knowledge of that advertisement, and further, knew that money was only carried at rates considerably in advance of those which he paid.

The first Judge held, that if a box is delivered generally to a carrier, and he accepts it, he is answerable, though the party did not tell him that there is money in it.

Lord Mansfield said, in rendering judgment, and his opinion became the judgment of the Court, as follows: "A common carrier, in respect to the premium he is to receive, runs the risk of them (that is the goods confided to him) and must make good the loss, though it happens without any fault in him; the reward making him answerable for their safe delivery. His warranty of insurance is in respect of the reward he is to receive, and the reward should be proportionable to the risk. If he makes a greater warranty of insurance, he will take greater care, use more caution, and be at the expense of more guards or other methods of security, and, therefore, he ought, in reason and justice, to have a greater reward."

Mr. Justice Yates held: "That a carrier may make a special acceptance, and that in the case in question, it was a special acceptance," and Mr. Justice Yates continues: "By the general custom of the Realm, a common carrier insures the goods at all events, and it is right and reasonable that he should do so, but

he may make a special contract; or he may refuse the contract in extraordinary cases, unless upon extraordinary terms."

Then our law relating to carriers, before our own legislation, made them insurers of the goods, which they undertook to carry, but authorized them to make special contracts limiting their liability. Our railway Acts must be interpreted, not in view of the English Acts, but in view of the law as it applied to, and was administered in this country previous to such Acts. Abbott in his work on Railway Laws in Canada, pages 296 and 297, says: "I take these principles in detail; the principle that the railway companies, as common carriers, are insurers of the goods, and cannot exempt themselves from liability for negligence, by notices, conditions or even contract. The jurisprudence has been long well settled in this country; though as to the last proposition, great doubts have been expressed, in recent years, as to its application in all cases, by Judges whose opinion is entitled to highest respect." (Mr. Abbott referred to the opinion of Mr. Justice Taschereau, and Mr. Justice Strong, expressed in the case of *Vogel v. The Grand Trunk Railway Company*, reported in 18 Supreme Court Reports); and then continuing, Mr. Abbott cites a large number of cases in this province and in Ontario, which leave no doubt as to the justice of his conclusion, so far as the Courts of this province were concerned.

On page 303, Mr. Abbott repeats and sums up the doctrine on the point as follows:—

1st. This system (namely, the system by which a railway company causes the shipper of goods to sign a request to the railway company, asking it to receive the goods under the conditions endorsed on the shipping note, and, in its turn, issues to the shipper, a bill of lading containing the same conditions, and signed by the company, thus constituting a written contract of carriage), of written contract between the parties, does away with all the questions which formerly arose as to proof of knowledge of conditions on the part of the shipper.

2nd. The company cannot relieve itself by such conditions from the result of its own negligence, or that of its servants.

3rd. So long as no negligence is shewn on the part of the company, they would be relieved from liability should the case come within a condition contained in the bill of lading, which the Court would consider a just and reasonable one.

I have been unable to find upon what authority it is contended, that the Courts in this country, have the right to declare conditions of a special contract between a shipper and a railway company, unreasonable, and to refuse to carry them into effect upon that ground.

It needs scarcely be stated that freedom of contract, except when limited by law, is an essential condition of our constitution and that carriers' contracts would certainly not be limited to any extent greater than that authorized by some legislation applying to them. It is very true, that these contracts have been treated by the legislature, as being of such a character as to justify the controlling influence of Parliament, in many directions; but neither in England, before the cession of Canada, was any such power vested in the English Courts, nor, as far as I can find, has any Canadian statute authorized the Courts of this country, to refuse the execution of contracts made between the parties, on the ground of their provisions being unreasonable.

As far as I can see, this doctrine, extended to the jurisprudence of our Courts, appears to have grown up by what I may call, an unauthorized application of the Imperial Act, 17 & 18 Vict., to our administration.

I would therefore not feel myself free to refuse to give effect to a condition stipulated in a contract between a shipper and a carrier, because I might think that such condition was unreasonable.

There is another clause in the bill of lading which is pleaded by the defendant, namely: "That the shipper shall within thirty-six hours from the reception of the goods, make any

claim for damages, which he may have against the railway company."

That condition is a modification of article 1680 of our Civil Code, as follows: "The reception of the things transported, and payment of the carriage of freight without protest, extinguishes all right of action against the carrier; unless the loss or damage is such that it could not then be known, in which case the claim must be made without delay, after the loss or damage becomes known to the claimant."

In the present case, the facts to which this condition is alleged to be applied, are as follows: "The railway company, when the cheese arrived at the station in Montreal, load the boxes upon vehicles, and sent them by their carters to the plaintiff, accompanied by advice-notes, describing the nature of the goods, the number of boxes and the amount of freight. Upon each one of these advice-notes, the consignee of the goods was to sign, acknowledging their receipt, and did sign, but with the limitation, which he wrote upon the advice-note itself *so many boxes broken.*" These advice-notes indicating the number of boxes broken, were then delivered by the carters to the company. No statement of the exact amount of damage caused by the breakage of the boxes, was made until the close of the season, when the charge of ten cents, for each broken box was made, and claimed from the defendant. When the plaintiff began to make this reservation of broken boxes in his receipt of the goods, some conversation ensued between him and an officer of the defendant, and it was well understood, that the object of the plaintiff, in making the reservation in question, was to hold the defendant responsible for the damage resulting from the broken boxes.

Such a condition, both in this country and in England, has been held a reasonable condition, because it was necessary, in order to enable the carrier to have an opportunity of himself verifying the condition of the goods, and the amount of damage. In this case, so far as that reason is concerned, the carrier had

every opportunity of verifying, and did verify, because it appears in proof, that the defendant had, from its own agents, and independently of the action of the plaintiff above referred to, the advice of the number of broken boxes, and which advice corresponded closely with the information given by the plaintiff.

At the time or within thirty-six hours thereafter, it would probably have been impossible for the plaintiff to have ascertained the exact amount of his damage; and would, moreover, have involved estimates concerning damages amounting to sums of very small character, which would in practice have cost more to make than the amount claimed.

The only question to be decided is whether an intimation on the receipt itself, indicating the number of boxes broken, was a claim within the meaning of the condition above referred to.

I am to decide that it was, and that the plaintiff sufficiently complied with the condition in question.

As the action was brought by the plaintiff, rather as a test of his right, or perhaps I might say, as a stimulus to the railway company, that it had to exercise more care in the transport of such goods, than for the purpose of obtaining indemnity for damage actually suffered, the plaintiff consented, and the defendant accepted the plaintiff's consent, that in the event of the defendant being held responsible, the damages should be fixed at the sum of \$50.

I am to hold the defendant responsible, and, I accordingly condemn the defendant to pay to the plaintiff, the said sum of \$50, but under the circumstances, with costs of action as brought.

Macmaster, Hickson & Campbell, for the plaintiff.

Campbell, Meredith, Macpherson & Hague, for the defendant.

NOTE: This case has been carried to appeal.

TOLLS—REASONABLENESS.

NOVA SCOTIA.]

[SUPREME COURT.

RODGER V. MINUDIE COAL CO.

(32 N.S.R. 210.)

BEFORE TOWNSHEND, J., AND RUSSELL, LONGLEY AND DRYSDALE, JJ.

Railway company—Tolls for carriage of goods—By-law fixing rates—Non-approval by Governor-in-Council—Reasonableness of rate—Amendment to raise question—New trial.

An action by plaintiff as liquidator of the Canada Coal and Railway Company, Limited, to recover an amount claimed from the defendant company for car rental, etc., defendant pleaded by way of offset, a claim for repayment of over-charges for the carriage of coal made by the company in liquidation.

The evidence shewed that the Joggins Railway Company predecessors in title of the Canada Company, passed a by-law which was approved by the Governor-in-Council fixing the rate per ton for the carriage of coal over their line, and that the Canada Company subsequently passed a by-law increasing the rate, and that the defendant company were charged tolls as fixed by the latter by-law, although it had never received a sanction of the Governor-in-Council and they claimed to be entitled to recover the difference between the two amounts.

Held, that the by-law passed by the Joggins Company relating to the tolls to be taken by that company, was not a regulation affecting the road and running with the property, and was not binding upon their successors in title.

Held, also, that the Canada Company was not liable to refund moneys paid to them for the carriage of goods simply because they had failed to secure the approval of the Governor-in-Council to the by-law fixing the rates.

Held, nevertheless, that the trial Judge should have allowed an amendment applied for on the trial, intended to raise the question of the reasonableness of the rates taken, and that the appeal must be allowed and a new trial ordered on this ground.

APPEAL from the following judgment of Graham, E.J. It appears that the company, of which the plaintiff is liquidator, before the insolvency, and that the liquidator subsequently (the date is 10th May, 1904), owned a railway line from Maccan on the Intercolonial to the Joggins Mines, twelve miles long, for shipping their coal over the Intercolonial Railway.

The defendant company, also a coal company, had a short

branch from their mine at River Hebert to this plaintiff's branch, but had no cars. As a fact they both used the cars of the Intercolonial Railway. Formerly the government did not charge the Canada Company rental for the time their cars were waiting on these branch lines in the use of these companies. It had a charge of \$1 per day per car after 48 hours, but waived it in this company's case. Later it put on a charge in general use with all railways, viz., 20c. a day per car, and 80c. a day additional after twenty days. The government charged and the Canada Company paid this rate, and not only for the cars in use on its own line, but on the cars in use at the defendant company's mine on that branch. And it is not disputed that this was correct. The Canada Company notified the defendant company of this charge and demanded it from the defendants, and for some time it was paid.

The defendant company's manager, at the trial, hardly disputed the justness of it. There was an implied contract to pay the Canada Company the money which that company paid to the government really for the defendant company and the defendant acquiesced in the charge by some payments made to the Canada Company.

The Canada Company has also a charge for weighing the defendant's coals. They are weighed at Maccan on the government scales, but by the Canada Company's employee. I think it is a reasonable charge, and although it is now done by the Canada Company at a less cost than that which was required when the agreement was made for that charge, I allow it.

This made the plaintiff's claim in all \$1,080.30 against which there is an admitted set-off for coal of \$532.36. This leaves a balance.

But the defendant company has a claim which it puts forward.

The defendant company says, first, that the tolls which it paid for having its coal hauled over the Canada Company's line by that company covered this charge for rental.

I do not assent to that contention for several reasons, and I find that it did not.

But it has put forward a set-off of over-charges in the matter of those tolls which have been paid.

The Canada Company passed a by-law fixing its tolls for hauling coal at 40c. per ton, and it has charged and exacted that rate from the defendant company.

By the Railway Act, now R.S. (1900), ch. 99, sec. 219 (formerly 1898, ch. 4, sec. 19), it is provided as follows:—

“No tolls shall be levied or taken until the by-law fixing such tolls has been approved by the governor-in-council; nor shall any company levy and collect money for services as a common carrier except subject to the provisions of this chapter.”

It appears that the Canada Company submitted the by-law fixing the rate to the governor-in-council, but apparently no action was taken in regard to it.

It also appears that the Canada Company acquired this property from a former company, the Joggins Railway Company, and that the governor-in-council had in 1887, approved a by-law of that company fixing the tolls for coal at 28c., over this same railway.

And the defendant company contends that this bound the successor of the Joggins Company and that the defendant company is entitled to recover back the difference between the 28c. so fixed and the 40c. actually exacted.

I should not have thought that in the ordinary course, under the language of this statute, the Canada Company was bound by the 28c. rate so fixed and approved, merely by virtue of its having acquired the property of the Joggins Company, but perhaps I have not the data before me. But there is this dilemma, if it is not so, it has no approval for the rate it has fixed. And in either case there is an overcharge sufficient to wipe out the plaintiff's balance, claimed in this case. There is more than enough while the company operated the road, and also while the liquidator operated it.

The letters of the defendant company on the 28th and 31st Oct., 1903, responding to the Canada Company's letter demanding 40c. per ton, constitute a sufficient protest against the overcharge of 12c. per ton, and shew that the additional amount had to be paid in order to have the coal moved. It assumed that the Joggins Railway by-law bound. In one of these letters it is said: "This we pay to you under protest, and in so doing we do not admit your right to such payment, but pay it because you have refused to transport the coal otherwise."

I do not know why the government took no action on the by-law of the Canada Company for the larger rate, but it is one of the cases in which silence does not give consent. Perhaps it treated the matter as if the 28c. rate was in force. I think the Canada Company was left exposed to the effect of this drastic legislation and that in law there is an overcharge.

Objection was taken to the defendant's pleading in matter of this set-off. But I think it is sufficient. Money had and received by the Canada Company, and by the liquidator afterward to the use of the defendant company, was, I think, a proper form of action for money paid under protest where it was not lawfully payable. I therefore need not make the amendment asked for by defendant. The defendant is not entitled to any judgment for any excess of its claim over and above the plaintiff's claim.

He has, by his pleadings, put that amount against the plaintiff's claim, and as I understand the English idea of set-off, he would have no judgment for any excess. There is no counter-claim pleaded here. But in case the old practice of set-off in Nova Scotia, enabling the defendant to have judgment for any excess, still prevails, I think the defendant cannot have judgment for any excess here because it is not asked for in the pleadings. And even then it could not apply under the *Winding-up Act* against the estate of the company so far as the claim is against the Canada Company, certainly not in full.

The defendant company will have judgment, dismissing the action with costs, except those costs which are incidental to the

issues raised in respect to the plaintiff's claim other than the set-off.

The plaintiff will have the costs of those issues.

December 11, 1907. *H. L. Ralston*, in support of appeal. We are entitled to take a reasonable toll for carriage, though the rate was not approved by the governor-in-council. The defendants are bound to shew that 40c. was not a reasonable toll. There is no way in which the overcharge, if there is one, can be recovered back.

The amendment should be made and the question whether the rate was reasonable put in issue. We were bound to carry: *MacMurchy & Denison*, Railway Act, pp. 379, 381, 491; *Scott v. Midland R.W. Co.*, 33 U.C.R. 580. Tolls are the statutory rates approved. Rate covers the compensation at common law: R.S.N.S., ch. 99, sec. 2, sub-sec. u; R.S.N.S., ch. 99, sec. 281; *Lees v. Ottawa Ry.*, 31 O.R. 570. There must be an illegal demand and duress in order that the charge may be recovered back: *Green v. St. John & Maine R.W. Co.*, 22 N.B.R. 252. The demand was a just one and cannot be recovered back: *Briggs v. Boyd*, 56 N.Y. 291. Even if the demand is illegal, if there is no duress, the charge cannot be recovered back: *Brisbane v. Dacres*, 5 Taunt. 153. The payment was voluntary: *Benson v. Monroe*, 7 Cushing 126. It is not pleaded that the rate was unreasonable, and the onus is on the party claiming the set-off to shew that the rate was unreasonable: *Briggs v. Boyd* (*supra*). Regardless of statute we are entitled to hold what we have received. This action is under sec. 281 of Railway Act, which provides a remedy; 8 Am. and Eng. Ency. 934; *MacMurchy & Denison's Railway Act*, at 548. Protest does not apply unless the demand is unreasonable.

A. A. McKay, K.C., *contra*. The old tariff of the Joggins Company binds the plaintiff company. The Act of 1892, ch. 159, is the Act under which the plaintiff company took a transfer of the old Joggins Company's undertakings. The Joggins Company was subject to the Railway Act, and the plaintiffs there-

fore took the railway subject to that Act. Throughout R.S.N.S. ch. 99, secs. 215, 234, it is the railway which is affected. See also sec. 3 and sec. *r* of interpretation clause. If the 28c. rate is the binding rate then the overcharge can be recovered back protest or no protest. There is a fixed rate and a prohibition against taking anything more: 10 Chitty on Statutes, p. 66; *Great Western R.W. Co. v. Sutton*, L.R. 4 H.L. 226; *London & North Western R.W. Co. v. Evershed*, 3 App. Cas. 1029, at p. 1039. In consequence of the case of *Scott v. Midland (supra)*, the Dominion Act was amended. See *Lees v. Ottawa (supra)* per Meredith, C.J. There was a good protest from the time that plaintiff began to charge 40c. rate. The pleadings are good. The set-off contains the word "overcharge." Overcharge means excessive and therefore unreasonable. Further there was a legal toll established and the plaintiff company was taking more than the toll authorised. The plaintiff company should have replied that the 28c. tariff did not apply to them. As to the remedy R.S.N.S., ch. 99, sec. 281, preserves the right of the shipper to get back the money.

J. L. Ralston, in reply. The old tariff is not binding on the company. R.S.N.S., ch. 99, secs. 206, 209, 215. The by-law of the predecessor in title does not bind the new company. The Railway Act is an Act affecting companies, and not respecting the roads. The cases cited *contra* are all cases under protest. If defendant must recover he must recover the charge, because there was no evidence of unreasonableness. The amendment referred to by counsel for defendant does not affect the principle upon which *Lees v. Ottawa* was decided. There is no possible notice in the pleadings that the charge was not reasonable. As to the reply see *Culbert v. McKeen*, 20 N.S.R. 1.

December 14, 1907. DRYSDALE, J., delivered the judgment of the Court.

In this action the plaintiff sued for \$1,080.30 which was allowed subject to an admitted set-off of \$532.36. The point involved in the appeal is as to the right of the defendants to

set-off against the balance thus found of \$547.94 an alleged over-charge for carrying defendant company's coal by the Canada Coal and Railway Company, and by the plaintiff Rodgers as liquidator of said company.

It is contended that the Joggins Railway Company, the predecessor in title of the Canada Coal Company had a by-law fixing the rate for the carriage of coal over the road operated by the Canada Company at 28c. per ton, and that such by-law bound the Canada Company after it acquired the road. It seems the latter company, after it acquired the Joggins railway, passed a by-law fixing the tolls to be taken for carrying coal over its railway at 40c. per long ton, but such by-law for some reason was never approved by the governor-in-council. The by-law formerly passed by the Joggins Company had been duly approved, and it was strenuously argued before us that this former by-law of the Joggins Company was a regulation affecting the railway, ran with the road, and was binding on all those acquiring title through the Joggins Company, until the rate was changed by a by-law duly approved changing or altering the rate. It was contended that in the face of this fixed legal rate of 28c. per short ton the Canada Company illegally extorted 40c. per long ton, and that defendants have a right to recover from the plaintiffs this difference between 28c. and 40c. and set it off against the plaintiff's claim. If this claim is well founded it is conceded that the difference between 28c. and 40c. on the coal carried for the defendants would obliterate the plaintiff's claim. The learned trial Judge did not think that the Canada Company was bound by the 28c. by-law merely by virtue of its having acquired the property of the Joggins Company, but because the Canada Company had no approval of the governor-in-council for the rate it had fixed and collected, he held it had no right to retain the moneys collected from the defendants for the carriage of defendant's coal, and by his judgment he set-off the moneys so collected or so much thereof as was necessary to defeat the plaintiff's claim. As I understand the judgment of the learned trial Judge, he holds that unless tolls are fixed by law and duly

approved under section 215 of the Railway Act, and the sections following, all moneys paid to a railway company for the carriage of goods if paid under protest can be recovered back in an action for money had and received. I agree with the trial Judge that a by-law of the Joggins Company is not binding upon the Canada Company merely by virtue of the latter company having acquired the property of the former company. I do not think such a by-law is a regulation affecting the road and runs with the property. An examination of the Railway Act will shew that a company has power to make by-laws for very many purposes and with many objects; many relating to internal management of the company's affairs, and many relating to the operation of the road, all of which by the Act require the approval of the governor-in-council. By sec. 3 of the Act it is declared that all the provisions of the Act shall be construed as incorporated with the company's special Act, as forming part thereof, and as one Act, and when thus read and looking at the many subjects that may be dealt with by the company by by-law, one would expect to find that if any particular by-law were intended to be a charge upon or affect the road, so that its operation would be binding upon the property in the hands of subsequent holders or purchasers, there would be a clear legislative declaration to that effect. I find no such declaration and I think the by-law of the old Joggins Company relating to the tolls to be taken by that company like the other by-laws passed by such company do not bind the Canada Company.

I cannot, however, agree with the learned trial Judge that simply because the Canada Company failed to have its rate approved they are liable to refund moneys paid to them for the carriage of goods where such moneys have been paid under protest. Something more is required. The position of a company doing business without its tolls being approved was considered in a Divisional Court in Ontario before Meredith, C.J., Rose and MacMahon, JJ., in *Lees v. The Ottawa and New York R.W. Co.*, 31 O.R. 567. There the Railway Act under consideration was in all material respects the same as ours. The moneys

there sought to be recovered back were tolls paid for carriage of the person under the mistake of fact where the tariff had not been approved and it was sought to support the right to recover solely on the want of a by-law fixing the tolls. Meredith, C.J., delivering the judgment of the Court makes the following statement:—

“It is plain, I think, that the theory upon which the action to recover back the moneys paid by the respondent was brought cannot be supported. To give effect to it would be to hold that a company whose tariff has not been sanctioned by the Governor-General must not carry on its business, and is not at liberty even to make special contracts with persons who may be desirous of using the railway, for the purpose of travel or for the carriage of goods, for the service which is desired, and that if it does so though the service is performed and the charge made for it which has been paid is a reasonable one, the person who has got the benefit of it may recover back what he has paid, and for such a proposition I can find no warrant in the provisions of the Act.”

This I consider a sound declaration, and applicable to the defendant company's position herein. In the *Lees* case it was held that assuming the moneys to have been paid under a mistake of fact yet the money could not be recovered back because though the law would possibly not have compelled the respondent to pay the fares, what he paid was but a just compensation for the services which the company performed for him in consideration of it, and therefore in equity and conscience ought to have been paid by him. The rule down by *Lord Mansfield* in 1786 was applied, viz., “that if a man has actually paid what the law would not have compelled him to pay but what in equity and conscience he ought he cannot recover it back again in an action for money had and received.” In my opinion the case cited was well decided and is directly in point here. I do not regard sec. 219 of the Railway Act as a declaration that it is illegal on the part of a company to accept charges but rather as a clause aimed

at the right of a company to collect or enforce the payment of tolls. This the section says it cannot do without an approved by-law.

Holding as I do that the 28c. by-law of the Joggins Company is not binding on the Canada Company, and that the defendants cannot recover back moneys merely because the Canada Company's 40c. by-law was not approved in ordinary course, judgment would be directed for the plaintiffs, were it not for the fact that counsel for the defendant at the trial asked for an amendment intended to raise the question of the reasonableness of the rates that had been taken by the Canada Company and the liquidator. This application to amend does not seem to have been dealt with by the trial Judge until he had filed his reasons for judgment and then he did not consider an amendment necessary, I think this amendment should have been allowed, because in my opinion the very foundation of the defendant company's right to recover back from the Canada Company or the liquidator any moneys paid as freight, depends very largely upon whether the amounts exacted or taken were reasonable or unreasonable. No issue has been raised as to this and no trial had on the question. It was argued before us that the defendant company's set-off as pleaded raised the question of unreasonableness of the charges taken, but it is quite apparent on an examination of the pleadings and particulars furnished thereunder that the only overcharge being therein set up was one based on the validity of the old 28c. by-law. Indeed counsel for the defendant company was no doubt fully aware of this when he applied to amend on the trial. As it seems to me quite clear that unreasonable charges taken under some circumstances by carriers, may, to the extent that they are unreasonable, be recovered back, and as the defendant company was evidently attempting to raise the question of reasonableness on the trial, I think defendant ought to have an opportunity to amend and try out the real situation between the parties.

In my opinion the appeal must be allowed with costs, the

judgment of the trial Judge set aside, and the cause remitted for a new trial on the questions that may be raised by defendant company's pleadings, such company to be at liberty to amend its pleadings as it may be advised.

Appeal allowed with costs.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

ONTARIO.]

[COURT OF APPEAL.

MILLIGAN v. TORONTO R.W. Co.

(17 O.L.R. 530.)

Street Railway—Driver of Vehicle—Crossing in Front of Approaching Car—Negligence—Contributory Negligence.

The plaintiff was driving easterly in his carriage and pair of horses, at a moderate pace, along one of the streets of a city, and on arriving within thirty feet of a cross street, on which there was a street car line, he saw a car coming from the north, where there was a down grade, approaching at a rapid rate, the car being then about 300 feet distant. The plaintiff admitted that he could easily have stopped his carriage and horses before reaching the track. He consulted with his coachman, and, both being of the opinion the speed of the car was not so great as to prevent their crossing in safety, he attempted to do so, when the carriage was struck by the car, and damaged, and he, himself, injured. No attempt was made by the motorman to slow down the car. On questions submitted to the jury, they found that the accident was caused through the defendants' negligence, such negligence consisting in the car not being under proper control, and that there was no contributory negligence on the plaintiff's part:—*Held*, that it could not be said, in all the circumstances, the plaintiff acted so recklessly as to preclude the submission to the jury of the question whether or not he acted with reasonable care; and a finding by the jury in the plaintiff's favour was upheld. Judgment at the trial and of the Divisional Court affirmed, Moss, C.J.O., and MEREDITH, J.A., dissenting.

THIS was an appeal from the judgment of the Divisional Court, affirming the judgment at the trial.

The action was tried before CLUTE, J., and a jury, at Toronto on the 30th and 31st January, 1908.

It was brought to recover damages sustained by the plaintiff through a collision on the 28th April, 1907, at the corner of Wellesley and Church streets in the city of Toronto, of one of the

defendants' cars with a carriage, in which the plaintiff was driving, occasioned, as it was alleged, through the defendants' negligence. The facts are fully stated in the judgments.

No witnesses were called for the defence.

Questions were submitted to the jury, which with their answers were as follows:—

“1. Were the defendants guilty of negligence that caused the accident. A. Yes.

“2. If so, what was the negligence? A. By car not being under proper control.

“3. Could the plaintiff by the exercise of ordinary care have avoided the accident? A. No.

“4. If you think the plaintiff by the exercise of ordinary care might have avoided the accident, was there anything which the defendants should have done, after the plaintiff was in danger, which would have avoided the accident; if so, what? A. By not reversing the motor. The foreman explained that what the jury meant by this last answer was that the motor should have been reversed. This answer, however, was in compliance with the direction of the learned Judge, subsequently struck out, as being unnecessary.

“5. At what sum do you assess the damages. A. \$1,000.”

Upon these findings the learned Judge entered judgment for the plaintiff.

From this judgment the defendants appealed to the Divisional Court.

On April 9th, 1908, the appeal was heard before MULOCK, C.J. Ex.D., TEETZEL and MAGEE, JJ.

D. L. McCarthy, K.C., for the appellants.

C. Miller, for the respondent.

April 13, 1908. The judgment of the Court was delivered by MULOCK, C.J.:—This action arises out of an injury to the plaintiff, his coachman, horses and carriage, in consequence of a collision between the plaintiff's carriage and one of the defendants'

cars on Church street, Toronto, at a point where it intersects Wellesley street.

It is charged that the collision was caused by the negligent management of the car by the defendants' servant, who was in charge of it. It appears that on the 28th April, 1907, the plaintiff, with his coachman, one Kelley, was driving easterly along Wellesley street, and when a short distance west of Church street observed the defendants' car approaching Wellesley street from the north. Thereupon the plaintiff inquired of Kelley whether he thought there was time to cross, when the latter gave it as his opinion that there was. The plaintiff evidently concurred in this view, and continued on his way easterly, crossing the track, when the rear wheel of his carriage was struck by the car, whereby the injury to the plaintiff was occasioned.

[The learned Chief Justice then set out the questions submitted to the jury and their answers thereto and proceeded.]

The real point involved in this appeal is whether the plaintiff was guilty of contributory negligence which occasioned the accident. It was contended by Mr. McCarthy that, seeing the car approaching, the plaintiff took a rash risk in endeavouring to cross in front of it; that his conduct was not that of a person exercising reasonable care; but that he was the author of his own injury; and that therefore, the case should have been withdrawn from the jury.

Having regard to the evidence, I am unable to assent to this view. The defendants, in the operation of their cars, are bound to exercise reasonable care, one of their duties being to have the cars under control when approaching a cross street. Here this duty was the more imperative because the car was travelling on a down grade. As it was the duty of the plaintiff to exercise care when approaching the track, so it was also the duty of the motor-man to exercise care when approaching a cross street. At the point of intersection of the two streets, vehicular and other traffic might reasonably be expected, and it was the duty of the motor-man to be on the look-out for such traffic, and, if encountered, to have such control over the car that he could bring it to a stop,

if such became necessary, in order to avert a collision. Was the plaintiff bound to assume that the motorman would neglect these duties? I think not. On the contrary, he was, I think, entitled to assume that the motorman would exercise reasonable care. The defendants in the operation of their cars are not entitled to assume the position that the public only must exercise care. The exclusive use of the portions of the streets occupied by the defendants' tracks, where they are intersected by cross streets, does not belong to the defendants; the public being also entitled to such user, and it is the duty of both the defendants and the public to exercise reasonable care, and to have due regard for such mutual rights in respect of the common ground within the range of the intersection of the car tracks and cross streets.

The finding of the jury shews that the motorman neglected his duty of failing to have his car under control. I fail to find any evidence to warrant the conclusion that the plaintiff had reason to anticipate the motorman's negligence, and the finding of the jury that the plaintiff was not guilty of negligence is conclusive that he expected the motorman to have his car under control, and that therefore it was safe for him to cross the track.

For these reasons, I think, the learned Judge ruled properly in refusing to nonsuit and in taking the opinion of the jury as to whether the plaintiff had been guilty of contributory negligence. They have found that he was not, the verdict ought to stand, and this appeal should be dismissed with costs.

From this judgment the defendants appealed to the Court of Appeal.

On September 22, 1908, the appeal was heard before MOSS, C.J.O., OSLER, GARROW, MACLAREN and MEREDITH, JJ.A.

Wallace Nesbitt, K.C., for the appellants. The learned trial Judge should have nonsuited the plaintiff. He was guilty of contributory negligence, or was the author of his own injury, as appears from his own statement. He saw the car when he was thirty yards off and he continued to approach the crossing,

and when he was within six yards of the westerly track he saw that the car was approaching at a terrific rate of speed, and it could not but be apparent to him that it would be impossible for him to cross over in front of the approaching car in safety. No prudent man would have attempted to do so, yet he deliberately makes the attempt. The fact of his asking his coachman whether he thought he could safely cross, shewed that he realized that it was a dangerous thing to do. The plaintiff seeing the car and crossing, with knowledge of its approach, took upon himself the risk of any disaster which might happen: *Hainer v. Grand Trunk R.W. Co.* (1905), 36 S.C.R. 180; *Allan v. Metropolitan R.W. Co.* (1888), 4 Times L.R. 561; *Hill v. Toronto R.W. Co.* (1907), 9 O.W.R. 988; *Gosnell v. Toronto R.W. Co.* (1904), 4 O.W.R. 213; *Gallinger v. Toronto R.W. Co.* (1904), 4 O.W.R. 522; *Danger v. London Street R.W. Co.* (1899), 30 O.R. 493; *O'Hearn v. Town of Port Arthur* (1902), 4 O.L.R. 209; *Casey v. Canadian Pacific R.W. Co.* (1888), 15 O.R. 574; *Follet v. Toronto R.W. Co.* (1888), 16 A.R. 346; *Blake v. Canadian Pacific R.W. Co.* (1889), 17 O.R. 177, 180. It was also urged at the trial this was a usual stopping place, and that the plaintiff relied on the car stopping at that corner, but there was nothing to indicate to him that it would stop. It is a very different case from that of *Tinsley v. Toronto Railway Co.* (1908), 17 O.L.R. 74, where the plaintiff saw the two persons standing at the corner signalling the car to stop. It is also a very different case from *King v. Toronto R.W. Co.*, [1908] A.C. 260, where the plaintiff might reasonably have assumed by reason of the motorman having turned off the power that the car was going to stop; the defendants' negligence consisting in the power being turned on again, and the car starting without any notice to the plaintiff of the intention to do so.

C. Miller, for the respondent. The undoubted facts here are: The plaintiff sees the car coming, when it was some distance off; he thought it was coming at a rapid rate, but he could not accurately tell how fast; not so fast but that he thought he could cross in safety. He not only uses his own judgment, but he consults his coachman, and they both think that under the

circumstances, there is plenty of time to cross over in safety. It is quite apparent that had the car been running at a reasonable rate of speed and under proper control, he could have so crossed, and that the accident would not have happened. The contention of the other side is that if he does not look out, his omission to do so is evidence of negligence on his part, and that if he does look, and in the exercise of his judgment, attempts to cross over the street, and it turns out that his judgment was wrong, that the car was running at a greater rate of speed than he anticipated, he also cannot recover. *Hainer v. Grand Trunk R.W. Co.*, 36 S.C.R. 180, and cases of like character, were cases of steam railways running on their own right of way. It is a different matter, however, with street railways which are running on the public streets in which the public have rights as well as the railway company. It was just as much the duty of the motorman to see that he could safely go ahead as it was of the plaintiff to see that he could safely cross. Here we find that he was running his car at an excessive rate of speed, but for which the accident would not have happened. The defendants' contention amounts to this, that the motorman can say, "I can run my car at what rate of speed I like," and can in effect say to the plaintiff "get out of my way or I will run you down." There was evidence of negligence on the defendants' part to submit to the jury, and no evidence of contributory negligence on the plaintiff's part, and the finding in favour of the plaintiff cannot, therefore, be disturbed.

November 10, 1908. Moss, C.J.O.:—After careful consideration of this case I feel myself unable to agree that the judgment entered for the plaintiff should stand.

I come to this conclusion almost entirely on the plaintiff's own statements at the trial. He appears to have given his evidence fairly, frankly and without reserve, and the only question is whether upon that evidence he was entitled to a verdict and judgment in his favour.

It is beyond question that the defendants' car was being run at an excessive and dangerous rate of speed, and if a finding to

that effect was all that was necessary to entitle the plaintiff to judgment there could be no doubt of his right to it. But in connection with the defendants' conduct the plaintiff's conduct has to be taken into consideration. If by his conduct he caused or contributed to the accident he should not succeed. According to his account of the occurrence he was driving eastward on Wellesley street on the south side some three or four feet from the kerb at a pace of about four miles an hour with a pair of horses capable of being easily controlled and at the time perfectly under control. When the front of the carriage in which he was seated was about twenty-eight or thirty feet from the intersection of Wellesley street with the asphalt pavement on the roadway of Church street he saw a car about three hundred feet (the coachman says it was 65 yards) north of Wellesley street coming south on the line of rails nearest to him. It appeared to him to be coming at a rapid speed, he could not say when examined in chief how fast, but afterwards he stated that it must have been coming down at the rate of from 20 to 25 miles an hour to have reached him when it did. He drove on, touching the horses with the whip and probably slightly accelerating their pace. When he reached the intersection with the asphalt on Church street and the horses' heads were some five or six feet from the line of rails, the car was a few feet north of the north intersection of Wellesley street still maintaining the same rate of speed. He did not see that the motorman was doing anything to stop the car. He could at that moment have stopped the horses or turned them to the north or south, in which case the car would have passed without doing any injury, but he did not do so. He drove on and the carriage was struck.

His account as given on cross-examination is as follows:—

“Q. To get to the track you had to pass over that thirty feet, then you had to pass over the distance between where the asphalt begins and the western track on Church street? A. Yes. Q. So that all that time the car was in your view? A. I would not say that, it was part of the time. I saw it from time to time. Q. You did not disregard it as I understand you? You did not

simply take one look and never look again? A. No. Q. You did not simply size up the situation, but kept looking from time to time? A. Yes. Q. And each time you looked the car was coming closer? A. Yes. Q. And each time you looked you realized the speed it was coming? A. I could not tell the speed it was coming. Q. But you saw it was coming very fast? A. Yes. Q. And you realized that it was coming on you very rapidly? A. Yes. Q. You had the horses under perfect control? A. Yes. Q. You could have pulled them up immediately? A. I could have pulled them up in a very short distance. Q. So that you could have stopped them within five or six feet if you had wanted to? A. Easily. Q. At the speed the car was coming when your horses were five or six feet from the western track, how close would the car be to you then? A. I could not tell you; it was getting very close. Q. Even then when you were five feet away from the western track you could still have stopped those horses? A. Yes, I could. Q. And you could have turned either to the right or the left hand? A. Yes. Q. They were perfectly in hand? A. Yes. Q. But your opinion is that you slightly increased your speed and went over? A. I thought I had plenty and sufficient time to have got over."

Further on he continues: "Q. The position you describe to us is that when your horses' heads were five or six feet from the western rail of the western track the car was still a bit north of the north Wellesley crossing? A. Yes. Q. And going at a furious rate of speed? A. Yes. Q. And you saw it there? A. I said I saw it there. Q. And you could have stopped your horses if you had wanted to? A. Yes. Q. Could have turned to the right or left hand? A. Yes. If they had given me any warning that they were coming I certainly could have done it. Q. You kept right on and thought you were going to clear it? A. Easily." When he first saw the car he says he asked his coachman if he thought they had time to cross, and the latter according to his evidence replied "sufficient" or "plenty." The coachman speaks of this more fully than the plaintiff and seems to think that it was when they were at the intersection that the question was asked.

Upon this evidence I am unable to see upon what principle the plaintiff should succeed in a claim for damages against the defendants. It is difficult to understand how he or his coachman could have believed or thought that there was plenty or sufficient time to cross in safety, or why the plaintiff should have supposed that the car was going to stop at the crossing. Even when he first saw the car there was nothing to indicate an intention to do so. It was coming at a very rapid pace, there were no persons waiting at the corner to board it and the motorman was making no motions signifying that he was throwing off the power or applying the brake. But when the car had almost reached the corner with speed undiminished and still no indications from the motorman, and while the plaintiff was still in a place of safety and able by coming to a stop or drawing aside to have avoided the accident, it is yet more difficult to understand why he did not do so, and why he rather chose to take the risk of continuing on his way. To have stopped or drawn aside would not have involved more than a couple of minutes' delay. There was no pressing need for hurry on his part. He was not nervous or agitated or flurried or rendered incapable of thought or action. On the contrary he appears to have calmly calculated his chances and to have deliberately made up his mind to take them. I think the case ranges itself with that class of case now very rare indeed, but not entirely excluded by authority in which a plaintiff may in the course of proving negligence against the defendants shew that he was himself the author of the injury of which he complains in such a way as render it the duty of a Judge to withdraw the case from the jury.

But if the case had to be submitted to the jury, I still find it very difficult to understand how they could say as they did that the plaintiff could not by the exercise of ordinary care have avoided the accident. Their finding in this respect was not only against the weight of evidence, but as I venture with submission to think without any reasonable evidence to support it.

In my opinion, therefore, the plaintiff ought not to succeed in this action.

I may add that, in my opinion, there is a clear distinction between this case and *Tinsley v. Toronto R.W. Co.* (1908), 17 O.L.R. 74.

In that case there was evidence of persons standing at the corner waiting to board the approaching car and of a signal to the motorman to stop, and that the plaintiff in reliance upon those facts believed that the car would come to a full stop—factors which are wholly wanting in this case.

OSLER, J.A.:—Upon the best consideration I have been able to give to this case, and not without some feeling that verdicts such as the one before us, place, as it has been said, trial by jury itself upon trial where corporations are concerned, I feel obliged to affirm the judgment though I would concur in granting a new trial if that course should be approved of and if the defendants desire it. That the defendants were negligent is certain, and is not denied. What is not so certain is that their negligence, rather than the reckless conduct of the plaintiff himself was the effective cause of the accident. As to this the jury by their first and second answers have absolved him. If they had found the other way I do not believe that any one, regarding the evidence in a spirit of judicial detachment would say that they were wrong. But I am equally unable to say that upon the evidence as presented the trial Court ought to have dismissed the action; in other words, I think, there was a case for the jury. When the plaintiff arrived at the intersection of Wellesley street and Church street it came to be a question of the evidence of proper and reasonable judgment whether he should cross or no. It must generally be so when a car is seen to be approaching. It may be so distant that the driver feels that he need not give the matter a second thought. It may be so near that ordinary men would at once say that no one but a recklessly careless driver—a madman—would attempt to pass in front of it. Between two situations there is a third which invites thought on the part of the reasonable man. Is the driver necessarily careless because he deliberates, however briefly, and comes to a

conclusion taking everything into consideration, his own distance from the track, the distance of the car from the crossing, its apparent speed and that the motorman may be expected to have the car under control, that he has time, not very much perhaps, but sufficient time to cross the track before the car will arrive at the spot? Must he, if he finds himself mistaken, then necessarily be regarded, for that is what it comes to, as the author of his own wrong? I am inclined to think that where such a situation is developed it raises a question for the fair and honest consideration of the jury, whether, under all the circumstances the plaintiff acted with reasonable care or not, or whether he ought to be considered as having been really the author of his own wrong, and upon their answer we must leave it unless a case for a new trial is made out. If in the present case we can do no more than say that the answer to the third question should have been that the plaintiff by the exercise of reasonable care could have avoided the accident, a new trial would be necessary, because the fourth question, which seeks to discover where the ultimate negligence in that event lay, remains unanswered, the jury having withdrawn the answer, even as amended, which they at first gave to that question. If there is not to be a new trial the appeal should be dismissed.

As regards the *Tinsley* case recently before this Court, I should perhaps add that my own view was that the plaintiff, who was walking, was shewn to have attempted to cross in front of the car when from the rate at which it was going when he was close to it, he could not have had the least reason for supposing, either that it was about to stop, or that it could have been stopped before reaching the point at which he attempted to cross in front of it.

GARROW, J.A.:—[After stating the facts.] To maintain an action of negligence the plaintiff must prove two things: first, the negligent act of which he complains, and, second, that such negligent act alone caused the injury. If at the close of his case the evidence is such that a jury acting rea-

sonably could not in the opinion of the Judge find both propositions to be established he should dismiss the action.

If there is reasonable evidence upon both branches and the defence is contributory negligence (which necessarily presupposes negligence on the part of the defendant) the case is a proper one for the jury and cannot be withdrawn from them.

Here the first branch is amply proved, is in fact not disputed.

The difficulty is solely as to the second, as to which there is certainly room for two opinions. If a man, whether driving or walking, deliberately places himself in front of a rapidly moving car which he sees and is run over, the cause of his injury is his own act. What happened was the inevitable, and in no reasonable sense was caused by the car. He had a choice, and the car, or those operating it, had none.

But that is not this case, although the argument is that it is. The plaintiff was driving towards home upon a public highway crossed by the railway track and had, of course, the traveller's usual impatience to reach the end of his journey. He was an elderly man and in the absence of any evidence to the contrary, except his conduct on the occasion in question, it may be assumed of at least ordinary prudence and judgment. He did not trust alone to his own judgment, but appealed to that of the coachman, and both agreed that it was safe to cross. It turned out that it was not safe, but the reasonableness of what was done must, I think, be looked at from the plaintiff's then standpoint, there upon the street, with his horses claiming at least part of his attention. If he was to cross at all he had but time for a moment's consideration. He saw and knew the car was approaching rapidly, but as it was coming towards him the opportunity for anything like exact observation was not so good as if he had been further to the side. He says he did not appreciate the speed, and, moreover, that he expected it to slow up or stop where it usually stops at the north side of Wellesley street. People constantly incur risks in crossing city streets, not merely from street cars, but from all kinds

of rapidly moving vehicles, and I find myself quite unable to say that under all the circumstances the plaintiff acted so recklessly that all question of the exercise of reasonable care on his part should have been withdrawn from the consideration of the jury and his action dismissed.

Reasonable care is a matter of fact and therefore if there is any reasonable evidence must necessarily be for the jury. Here it was a question of the proper inferences to be drawn not from any one specific statement on one side or the other, but from the whole evidence, including the surrounding circumstances, and it cannot, I think, be said that there was no evidence at all upon the subject proper for the jury. Nor can the question be affected by what we were told is the usual result when such matters reach the jury. We do not make the laws, but we should at least try to administer them as we find them, whatever the consequences may be.

The appeal should, I think, be dismissed with costs.

MACLAREN, J.A. :—The argument submitted to us on the part of the defendants was this: that the evidence of negligence on the part of the plaintiff was so clearly established by his own evidence that the case ought to have been withdrawn from the jury and the action dismissed.

The negligence of the defendants is admitted; the claim of the defence is that contributory negligence is so manifest that there was nothing to submit to the jury.

It is to be borne in mind that once the negligence of the defendants and its causing the injury is admitted or established, the onus of proving contributory negligence or the negligence of the plaintiff is upon the defendants, even although the evidence relied upon is frequently, as in this case, obtained from the plaintiff and his witnesses.

Whether the plaintiff has or has not exercised ordinary care in the circumstances is a question of fact, and as such is, as a rule, to be determined by the jury. Indeed, so very rarely is it otherwise, that in the well-known case of *Slattery v. Dublin*,

Wicklow and Wexford R.W. Co. (1878), 3 App. Cas. 1155, at p. 1178, Lord Penzance, who formed one of the majority and gave one of the leading judgments, was able to say that of the twenty-nine cases there cited and commented on, there was not a single case in which the defendant's negligence and its relation to the accident being in the opinion of the Court sufficiently supported by evidence to be left to the consideration of the jury, the Court had gone on to decide for itself that the plaintiff's negligence had also been established.

A close examination of the cases since that time, in which it may appear as if the Court itself had passed upon the question of the sufficiency of the evidence to establish contributory negligence, will probably shew that in a majority of them the decision has been rather based upon the ground that the evidence failed to establish that the negligence of the defendant had really caused the accident. However, in the view that I take of the present case, it is not necessary to discuss that question.

Even if the matter were open to us and were *res integra* a careful reading of the evidence would not make on my mind the impression that want of ordinary care on the part of the plaintiff was established. The point most strongly urged against him, namely, that he asked his coachman "whether there was time to cross," is, I think, quite open to another interpretation, namely, that he was cautious and wished to have his opinion confirmed by one whom he considered a better judge in such a matter than himself. The answer "plenty of time," fully confirmed his own judgment on the point.

The evidence shews that a house on the north-west corner of Wellesley and Church streets prevented the plaintiff from seeing the car until he was quite close to Church street. Being so nearly in the line of the direction of the car he would not be able to estimate or realize its speed, and he tells us that it turned out that it was going much faster than he thought. As it was, one or two seconds more would have cleared him. Not knowing the contrary he was at liberty to assume that the car was coming at normal speed in which case he would have been quite safe.

The plaintiff says further, that as the motorman did not sound his gong, he was under the impression that the car was going to stop at the north side of Wellesley street. The defendants' "book of rules" and the "instructions to motormen" put in shew that motormen when approaching a cross street at which they are not going to stop are to ring the gong well when within 100 feet of the cross street and to keep it ringing until the street is passed.

But the matter is not *res integra*, and, even if my impression were more favourable to the defence than it is from the reading of the evidence, I would find it difficult to ignore the fact that so many persons, many, if not most of them, more competent than I am to pass upon such a question, have passed upon it adversely to the defendants.

In the first place, the plaintiff, an elderly man and accustomed to horses and street cars, found his own opinion as to the safety of crossing full confirmed and strengthened by his coachman, who may fairly be looked upon as an expert in such a matter. The trial Judge, who saw and heard the witnesses, not only held that there was evidence on which the jury ought to pass, but from his charge it appears that he thought the jury might fairly find either way. The twelve jurymen who heard the evidence have found that the plaintiff by the exercise of ordinary care could not have avoided the accident. In the circumstances this means not that the plaintiff could not have avoided it, as, of course, he could have done by not going near the track, but that ordinary care or caution did not require him to refrain from attempting to cross, and he was not called upon to exercise extraordinary care or caution. Three Judges in the Divisional Court approve of the course taken by the trial Judge and express no dissatisfaction with the finding of the jury.

The plaintiff's conduct in the circumstances having thus been considered and reviewed by no less than seventeen persons, not one of whom has found that he was guilty of negligence or the want of ordinary care or caution, I would have had great difficulty in holding that he was so manifestly guilty of negligence

that the case should have been withdrawn from the jury; even if such had been my *primâ facie* opinion. But my own opinion being such as I have already stated I have no hesitation in coming to the conclusion that the verdict ought not to be interfered with, but that the appeal should be dismissed.

MEREDITH, J.A.:—Although the jury are the sole judges of fact they are such judges only in cases in which there is a reasonable question of fact to be determined. It is the duty of the Court to determine whether there is any reasonable evidence to go to the jury, upon any question of fact; and no such question can be rightly submitted to them until that question has been answered in the affirmative; though, of course, it is within the power of the Court to take the jury's finding upon any question of fact subject to the duty of the Court, notwithstanding it, to deal with the preliminary question before giving any effect to such finding. It ought not to be, though it may be, needful to say that this applies to the question of contributory negligence just the same as to all other questions of fact. The cases may seem to create much doubt and difficulty in the proper performance of the duty of the Court in this respect, upon that question, and possibly to give some excuse—if there really can be any—for the observation, now not uncommon, that every question of contributory negligence must go to the jury. But all of these cases have to be determined upon their own facts and circumstances, and no two are quite alike; and none can be a binding authority in any other case, whatever light it may throw upon the general question. So we have to determine now, whether there was any reasonable evidence to support the finding of the jury that the plaintiff was not guilty of contributory negligence; and I can come to no other conclusion than that there was not. In the broad daylight, with nothing whatever impelling him to take any risk, the plaintiff endeavoured to cross the railway track in front of a swiftly moving car, miscalculated as to time or distance, was struck and injured. He frankly admits having seen the car, and having seen that it was moving very rapidly—"at a furious

rate of speed"—and that he could, almost until the last moment, have stopped or turned aside and have avoided all possibility of injury, but that he went on, thinking that he might cross in time to prevent a collision. In these circumstances how can any reasonable man say that he might not by the exercise of ordinary caution have avoided his injury? He was in no way misled by anything done, or omitted to be done, by the driver of the car, that it was his duty to omit or to do. The fact that he asked his coachman—who also saw the car and thought it was approaching at the rate of about 25 miles an hour—if there was time to get over, and was answered in the affirmative, does not aid him; it tends to make more plain the fact that he knew there was some risk, and he was running into great danger on an estimation as to time and distance, hastily made, and regarding which there could be no certainty. One excuse given by him would have been a good one if there were any good ground for it, namely, that he thought the car should stop before crossing the street; but there was no good ground for so thinking; it was not the duty of the driver to stop there, and nothing to indicate that he would, but the opposite. Test the matter by applying what the plaintiff says, for his excuse, to the motorman. Would he be exculpated, even though he had the right of way, if obliged to say, I saw the plaintiff coming on at an excessive rate of speed, and could have avoided the accident almost until the last moment by stopping or turning aside, but I did not, because I thought, and my conductor expressed the opinion in answer to my enquiry, that we could pass before he reached the track. Are life and property to be so lightly considered; to depend upon the judgment of any man in a matter about which there could be no certainty, when the simplest precaution would insure perfect safety?

I deny the proposition that anyone can run into danger, without being guilty of negligence, if he only assert, or if only it be asserted in his behalf, that he relied upon those who caused the danger doing their duty. The vast majority of accidents arise from neglect of duty; and if one go abroad blind to the negli-

gence of others, mindful only of how things will be if everyone does his duty, he must very soon fall. Instinct, not to mention reason, would prevent such a course. Reasonable care against injury through the negligence of others must be taken by all who do not wish to invite disaster; and the more so when death-dealing instruments may be encountered.

Rapid traffic is a necessity of the day; the convenience of the individual must to some extent give way to its requirements, and so, by the very nature of the thing, as well as by enactment, these electric cars have the right of way accorded to them in the street traffic. It would be preposterous if such cars, with their needed speed and their many passengers, were obliged to give equal way to every other conveyance; were obliged to stop to permit any and every conveyance, or animal, or human being, which, or who, might be approaching the crossing at the same time, to pass over before them for fear that if they did not the other, relying upon the equal right, and an assumed presumption that no one would mistake, or neglect, his duty, would go on and be injured, with legal liability for the injury upon the owners of the car if it turned out that the other was right in his estimation as to which would reach the point of danger first.

The plaintiff admittedly knew the danger; might without difficulty, indeed without any sort of substantial inconvenience, have avoided it until almost the last moment, but he deliberately chose to go on, miscalculated and was injured; how can he lawfully recover?

The case of *King v. Toronto R.W. Co.*, [1907] A.C. 260, was, as it is in nearly all cases in which the question of contributory negligence arises in the Courts of this Province now, relied upon as authority for the contention that, however it may be as a matter of form, for all substantial purposes the question of contributory negligence is a question for the jury alone in all cases. There is, however, no sort of ground for any such extraordinary contention. That case was dealt with upon its own facts; and the reported reasons for the ultimate judgment expressly and

clearly shew that contributory negligence is no exception to the general rule as to the respective functions of Judge and jury. In this Court a minority of its Judges considered that the case was one which ought to have been withdrawn from the jury because there was no reasonable evidence adduced in it to support a finding in the plaintiff's favour; whilst a majority considered that there was such evidence and that the case could not rightly be withdrawn from the jury upon questions essential to the determination of the rights of the parties; but, having regard to what seemed to them indications of animus of the jury, disclosed in their answers to the questions submitted to them, and doubtless also to the well-known local conditions which had turned most of the residents of Toronto into persons having a personal grievance against the railway company, thought that there should be a new trial. Fortunately the case was carried to the Privy Council, where the errors of this Court were corrected and justice ultimately accomplished. The facts of that case were very different from those of this. There was no admission there, nor any evidence, that the driver of the waggon attempted to cross in the face of a car coming towards him at a furious rate, with the ability to stop or turn aside his horse and waggon, up to almost the last moment. In that case the car was plainly well under the control of its driver; and had had its speed reduced by turning off the power; and had then had the power put on, though the driver might, and, it might have been found, ought, to have seen the horse and waggon, and seeing ought not to have put on the power, but could and should have avoided the collision.

I would allow the appeal and dismiss the action.

CRIMINAL LAW—JURISDICTION.

ONTARIO.]

[COURT OF APPEAL.

REX V. GRAND TRUNK & CANADIAN PACIFIC R.W. COS.

(17 O.L.R. 601.)

Criminal Law—Order of the Railway Committee for Protection of Street Crossing Against Two Railways—Charge of Failure to Comply Therewith—Joint Indictment Against Both Railways—Validity of.

The Railway Committee of the Privy Council of Canada, upon the application of a city, in order to provide protection at a place where a street was crossed by the tracks of two railways, ordered and directed that the two railways should, within a specified time, properly plank between their said tracks, and also provide gates and watchmen thereat, and should thereafter maintain and protect the said crossing:—

Held, that a joint indictment against the two companies for the failure to place gates and a watchman at the crossing, would not lie; and therefore there was no jurisdiction in the court of general sessions of the peace to try such an indictment, and a conviction made at the sessions against the two companies was quashed.

The effect of secs. 165, 221 and 247 of the Criminal Code, and secs. 33, 427 and 431 of the Railway Act, considered.

THIS was a case reserved under sec. 1014 of the Criminal Code, R.S.C. 1906, ch. 146, by John Winchester, Esquire, the chairman of the general sessions of the peace for the county of York, on a trial before him and a jury on the 16th and 17th of January, 1908. at the sittings of the said general sessions at Toronto on an indictment, containing the following counts:—

1. "That the Grand Trunk Railway Company of Canada and the Canadian Pacific Railway Company of Canada, corporations incorporated under statutes passed by the Parliament of the Dominion of Canada and carrying on railway operations in the Province of Ontario and in and through the city of Toronto, in the county of York, and the tracks of which corporations now pass and have for a number of years passed across a certain public street or highway and means of communication, known as Bay street in the said city of Toronto, at a point where the said street is crossed by the Esplanade in the said city of Toronto; and the said railway corporations have been operating and running cars along their said tracks by engines for the purpose of carry-

ing on their business; and that these corporations were in law bound to protect the crossing of Bay street by their said tracks with gates and watchmen, and to maintain gates and watchmen at the said crossing to avoid danger to human life; and that, in the absence of reasonable protection and care, and in the absence of such gates and watchmen, the trains of the said railway corporations, running over the said tracks, upon and across the said crossing might endanger human life; and that the said corporations, against their legal duty to provide gates and watchmen as aforesaid, have, without legal excuse, unlawfully neglected and unlawfully omitted to provide watchmen at the said crossing, and to operate gates thereon so as to avoid danger to human life in the operation of their said trains, in consequence thereof the lives and safety of the public as well as foot passengers, as also other subjects of our Lord the King, during the time aforesaid, using that portion of Bay Street aforesaid crossed by the tracks of the said railway corporations, were imperilled and endangered, and in consequence whereof, by reason of such neglect, the said corporations did unlawfully cause grievous bodily injuries to one Francis Hart on or about the 24th day of May, in the year of our Lord one thousand nine hundred and seven, resulting in the death of the said Francis Hart; and that the said corporations did thereby commit an indictable offence contrary to the provisions of the Criminal Code."

2. "That the said corporations, the Grand Trunk Railway Company of Canada and the Canadian Pacific Railway Company of Canada at the city of Toronto, during the time and in the manner in the preceding count of this indictment set forth, did unlawfully commit a common nuisance, thereby occasioning injury to the person of a certain individual, to wit, the person of one Francis Hart, against the form of statute in that case made and provided."

3. "That the said corporations, the Grand Trunk Railway Company of Canada and the Canadian Pacific Railway Company of Canada, during the time and in the manner in the first count of this indictment set out, did have in their charge

and under their control railway cars and engines, and did operate and maintain the same, in, over, and upon a certain public highway and means of communication, to wit, Bay street, in the said city of Toronto, without taking reasonable precautions or using reasonable care to avoid danger to human life in the maintenance and operation of their said railway cars and engines upon the said street and highway, and without providing proper and sufficient precaution so as to avoid danger to human life, by reason whereof the lives and safety of the subjects of our Lord the King, during the time in the first count set out, using the said portion of Bay street in the said city of Toronto, were imperilled and endangered, and the said subjects of our Lord the King, during the time aforesaid, could not go, return, pass, repass, ride and labour, on foot and with their horses, coaches, carriages, carts or vehicles, in, through and along the said common highway, to wit, Bay street, as they ought and were wont and accustomed to do, to the great danger and common nuisance of all His Majesty's subjects, going, returning, passing, repassing, riding and labouring, in through and along the said common highway, to the very example of all others, and against the peace of our Sovereign Lord the King, his Crown and dignity, and against the provisions of the statutes in such case made and provided."

Upon the said indictment was endorsed the consent of the said chairman to the within indictment being preferred by the Crown Attorney for the county of York before the grand jury at the then sittings of the court of general sessions of the peace for the county of York.

The jury returned a verdict of guilty against both defendants, and sentence was deferred until the next sittings of the said Court, pending the disposition of the case reserved.

The following questions were submitted for the opinion of the Court:—

1. Had this Court jurisdiction to try these defendants upon the joint indictment preferred against them?
2. Is the indictment good in law?

3. Had this Court jurisdiction to try the offences charged, or was such jurisdiction vested solely in the Board of Railway Commissioners for Canada, by reason of the fact that the offence charged amounted in effect to a breach of an order of the Railway Committee of the Privy Council for a breach of which its successors in office, the Board of Railway Commissioners, are vested with authority to punish under the provisions of the Railway Act of Canada, 1906.

4. Was there any evidence that in acting as they did the railway companies, or either of them, were guilty of any criminal offence sufficient to put them on trial for the offences charged?

5. As to the Canadian Pacific Railway Company, did their employment of the Grand Trunk Railway Company, and the undertaking of that company to perform the terms of the order of the Railway Committee of the Privy Council, discharge the Canadian Pacific Railway Company from any criminal liability for default in the performance of such order?

6. Was my charge to the jury incorrect in any material particular in reference to the position of the Grand Trunk Railway Company?

7. Was my charge to the jury incorrect in any material particular in reference to the position of the Canadian Pacific Railway Company?

8. Was the consent of the Board of the Railway Commissioners necessary before this indictment could be proceeded with?

On May 4th, 1908, the case was heard before Moss, C.J.O., OSLER, GARROW and MACLAREN, JJA., and BRITTON, J.

E. F. B. Johnston, K.C., and *S. Denison*, for the appellants, the Canadian Pacific Railway Company.

D. L. McCarthy, K.C., for the appellants, the Grand Trunk Railway Company.

J. R. Cartwright, K.C., and *H. L. Drayton*, K.C., for the Crown.

The arguments sufficiently appear from the judgments. The following additional authorities were referred to: 2 Rolls

Abridgt., p. 81; *Rex v. Toronto R.W. Co.* (1905), 10 O.L.R. 26; Crankshaw's Criminal Code, p. 589; *Regina v. Racine* (1900), 3 Can. Cr. Cas. 446.

November 10, 1908. Moss, C.J.O.:—After careful consideration of this case I have come to the conclusion that the conviction cannot be sustained, and I only desire to add a few words to what has been said by my brothers Osler and Britton.

As the facts were developed at the trial the counsel for the prosecution and the learned chairman of the quarter sessions were convinced, and I think properly so, that the charges against the defendants could not be maintained on the ground of the commission of a common law nuisance by reason of the maintenance of level crossings or of the manner in which the trains passing were worked or managed on the occasion in question.

That became manifest as soon as it appeared that the defendants were complying with the statutory requirements applicable to the defendants' duty in those respects. The learned chairman withdrew that phase of the case from the jury, and the only questions that remained were those arising from a breach of duty in failing to comply with the order of the Railway Committee of the Privy Council with regard to the maintenance of gates and watchmen at the crossing in question. In respect of keeping watchmen or a watchman at the crossing on the night in question there was evidence shewing a clear and inexcusable disregard of the terms of the order. The defendants' failure to observe the terms of the order may have led, and probably did lead, to the unhappy consequences which the evidence discloses. But for these consequences the defendants cannot be held answerable in the present proceedings for the reasons stated by my learned brothers in which I concur.

The conviction must therefore be quashed.

OSLER, J.A.:—This was a case reserved by the chairman of the general sessions of the peace for the county of York under sec. 1014 of the Criminal Code, R.S.C. 1906, ch. 146.

Before answering the questions submitted, or such of them as

it may be necessary to answer, some of the proceedings at the trial may be briefly referred to. Counsel for the defendants moved to quash the indictment on the ground that though each might possibly be indicted separately for the nuisance created by the dangerous management of its own trains, engines and line, they could not be jointly indicted, the nuisance created by the one not being that created by the other; and on the further ground that if the nuisance was caused by the violation of the order of the Railway Committee the remedy or punishment was that provided by the Railway Act, and not by indictment. The motion was overruled, and the trial continued. At the close of the case for the Crown a discussion arose as to the nature and extent of the duty of the defendants in respect of the protection of the crossing, the breach of which was relied upon as creating the nuisance for which they were indicted, the defendants again contending that the only duty was that which had been cast upon them by the order of the Railway Committee of the 2nd November, 1897,* which it was urged had been sufficiently complied with, but the breach of which, if there had been in fact a breach, was punishable only under the special provisions of the Railway Act, in that respect. Counsel for the Crown thereupon said that for the purposes of the case he was inclined to think that the particular negligence complained of would be the default of the companies to carry out the terms of the order, and possibly their default in discharging the statutory obligation cast upon a railway company—if the jury should be of opinion that the absence of planking had anything to do with the alleged nuisance—to complete, plank and maintain the opening between the rails so as to afford access to the tracks at all times. He did not think it would be necessary in this case to raise the common law question, and he was not now raising it. After further discussion:—

“*Mr. Nesbitt*: It brings it all back to one point, there cannot be anything to go to the jury except the gates and crossings—that is the protection of the crossing by watchmen and gates.

*This order is set out in the judgment of Britton, J., *post* pp. 462, 463.

"Mr. Drayton: We have gates, crossings and planks. I don't think there is anything else.

"HIS HONOUR: I don't think there is anything else.

"Mr. Nesbitt: I want to get it clear, nothing else will be submitted.

"HIS HONOUR: I think that is all, Mr. Nesbitt."

It is therefore quite clear that whatever may be the scope of the indictment as framed, that is to say, whether or not it could have been regarded as charging the defendants with the commission of a common law nuisance, apart from anything arising from the alleged breach of the order of the Railway Committee, the sole question to be tried thereon was whether they could be convicted for a nuisance in respect of their neglect or omission to maintain gates and watchmen at the crossing in question as required by the order. We may leave out of view the question of planking which was not urged before us and of which nothing appears to have been said in the charge to the jury, who were told that the question for them to decide was "whether there was the legal duty of the corporations, both Grand Trunk Railway and Canadian Pacific Railway, to protect the crossing by placing watchmen there for the protection of people," the duty referred to being as elsewhere stated in the charge "that contended to have been imposed upon both companies by the order of the Railway Committee."

On the argument of the appeal the points which had been taken at the trial were again argued before us.

In each of the three counts the defendants are charged jointly, and not separately, with the commission of the offence specified therein.

"Where several persons join in the commission of an offence all or any member of them may be jointly indicted for it": Archbold's Criminal Pleading and Evidence, 22nd ed., p. 77, citing 2 Hale 173; and see Hawkins, P.C. Bk. 2, ch. 25, sec. 89. In *Rex v. Trafford et al.* (1831), 1 B. & Ad. 874, 887, the defendants were indicted jointly for a nuisance, and it appeared that they had erected artificial banks or fenders along the course of a stream

passing through their respective lands, the result of which was to pen back the waters of the stream and thus injure certain structures connected with a canal; and it was held that though they had acted separately in raising the fenders and banks of their respective lands, yet as the grievance complained of was the result and effect of the acts of all jointly there was no objection to the indictment including all. And see vol. 22, Cyc., pp. 373, 374, 375; *Commonwealth v. McChord* (1834), 2 Dana (Kentucky) 242; *Commonwealth v. Müller* (1849), 2 Parson's Select Cases (Penn.) 480, 491; *Griffin v. Mills* (1877), 39 N.J. Law 587, 589.

If, therefore, the defendants can, under the circumstances, be indicted at all for a nuisance jointly committed by them, it must depend upon the existence of an order imposing some joint duty or obligation upon them. In the absence of, or apart from, such an order, any nuisance alleged to arise out of the neglect to observe a general obligation to maintain gates and watchmen or otherwise protect the street crossing is necessarily a separate offence on the part of each defendant with reference to the management of its own trains, engines and line of tracks. It was, therefore, properly conceded at the trial that the order of the Railway Committee was the only foundation for a joint indictment whether the defendants were charged under section 221 or were sought to be made liable under section 247 of the Code. I agree with my brother Britton's reasons for holding that no offence has been proved under the latter section.

Section 165 of the Code enacts that every one is guilty of an indictable offence who without lawful excuse disobeys any lawful order, other than for the payment of money, made by any person or body of persons authorized by any statute to make or give such order unless some penalty is imposed or other mode of proceeding is expressly provided by law.

The defendants could not be convicted of an indictable offence under this section, because sec. 427 of the Railway Act, R.S.C. 1906, ch. 37, read in connection with sec. 33 of the same Act, does expressly provide an appropriate remedy by way of penalty for

disobedience to the order of the Railway Committee, and the application of sec. 165 is thus by its very terms expressly excluded: see *The Queen v. Hall*, [1891] 1 Q.B. 747.

The offence charged in effect amounts to a breach of the obligation imposed by the order of the Railway Committee. That is the way in which the charge was presented and prosecuted and left to the jury, and its real character is not changed merely by calling it a nuisance. It was, therefore, only under the provisions of sec. 427 of the Railway Act, sec. 165 of the Code, as I have shewn, not being applicable.

I am not deciding, and it is not necessary now to decide, whether, apart from the order, the defendants might not be prosecuted for a nuisance on separate indictments, or upon an indictment charging them severally, upon the principles established by the cases referred to in *Union Colliery Co. v. The Queen* (1900), 31 S.C.R. 81; 10 Cyc., pp. 1226, 1227; Am. & Eng. Ency. of Law, 2nd ed., p. 842, notwithstanding the order and the remedy provided in case of its disobedience by sec. 427 of the Railway Act. That would involve the consideration of what has been decided by the Supreme Court in *Grand Trunk R. W. Co. v. McKay* (1904), 3 Can. Ry. Cas. 52, 53; and I do not think that this is at present before us. If such an indictment does lie it does not depend upon the provisions of the Railway Act, in which I see nothing which suggests that the consent of the Railway Commissioners is a condition precedent to bringing it.

In view of what I have said the only question which I think necessary to answer is the first, which should be answered in the negative.

The result is that the conviction must be quashed.

BARRTON, J.:—The offences charged are statutory. The first two counts are laid under sec. 221 of the Criminal Code. This section defines what a nuisance is, and the act charged is a nuisance within the meaning of that section. The third count is under sec. 247 of the Criminal Code; and, I may say at the out-set, that, in my opinion, this section does not apply, and was not intended to apply, to what is complained of here. It may be applicable to

the engineer in control of his engine, but it can hardly be said to apply to a case of neglect to do what might be necessary to prevent persons coming upon or crossing the track, to the use of which a railway is by law entitled. It may be applicable to a person who neglects to apply the brakes for stopping a train, or to a person who by wilful neglect permits an explosion by steam, but it does not apply to neglect by workmen or officers of a company, not on board a train, who neglect to give warnings at crossings, by watchmen, or by a bar or gate, or the erection of signs. As to the first and second counts, it is simply a question of evidence.

The court of general sessions has jurisdiction to try these defendants, the same as any other defendants, unless by reason of something in the Railway Act, that Court is ousted of jurisdiction. This is not a prosecution for a penalty under the Railway Act, so sec. 431 of that Act does not apply.

Whatever provisions there may be in the Railway Act for the protection of the travelling public, I do not find anything to interfere with the ordinary prosecution for offences under the Criminal Code, even if committed by railway companies or their officers, unless the offence be one for which the Railway Act directs the penalty or punishment. In form the indictment is sufficient. Apart from the duty placed upon the defendants by the order of the Railway Committee of the Privy Council of Canada, I am of the opinion that there was no joint duty placed upon them; and so any unlawful act, if there was any such, or any omission to discharge a legal duty, if there was such omission, was the separate act or omission of each defendant, and there would have been no evidence to submit to the jury, of any joint act or omission such as charged.

The order of the Railway Committee of the Privy Council places the defendants in an entirely different position. The Committee on the 2nd November, 1907, in pursuance of an agreement called "The Esplanade Agreement," made an order as follows:—

"The corporation of the city of Toronto having applied to the

Railway Committee of the Privy Council of Canada for an order directing that the Grand Trunk and Canadian Pacific Railway Companies shall place gates and watchmen at the crossing of Bay street in the city of Toronto—as shewn on the plan accompanying its application (file No. 7,006)—and properly protect the said crossing in accordance with the provisions of an agreement, known as ‘The Esplanade Agreement,’ made between the Grand Trunk and the Canadian Pacific Railway Companies and the corporation of the city of Toronto and which was confirmed by the Act, 56 Vict. ch. 48 (D.).”

“The Committee, being of the opinion that protection should be provided at this crossing, and in pursuance of the said agreement, hereby orders and directs that the Grand Trunk and Canadian Pacific Railway Companies shall, within eight weeks from the issuing of this order, properly plank between the tracks of the respective companies at the crossing of Bay street, in the city of Toronto, by the tracks of the said railway companies, and also provide gates and watchmen thereat, and thereafter shall maintain the said crossing and protection.”

“Nothing in this order, or in the documents or proceedings on which it is founded, is to prejudice the contention of the city or the said railway companies, on the question whether Bay street, extends further south than the north side of the Esplanade in the city of Toronto.”

“ANDREW G. BLAIR,

“*Chairman.*”

“Ottawa, Nov. 2nd, 1897.

The duty under that order continued until the 24th of May, 1907. It is alleged that the defendants on that day both omitted to perform their duty, and, if this case could be tried upon indictment at the sessions and by a jury, there was evidence upon which a jury could find the fact of such joint omission.

It is quite true that upon the indictment, each could not be found guilty of separate acts or parts of that which is charged as a joint offence. See *Rex v. Hemstead* (1818), R. & R. 344.

This case decides that upon a separate finding upon a joint indictment, punishment could not be imposed upon one without a pardon for the other.

As these defendants are charged, a joint offence must be proved.

Apart from the effect of the order of the Railway Committee of the Privy Council, they were not acting together. Each was either attending to, or neglecting its duty; but that order is a binding one, creating the joint duty and permitting, if the evidence warrants it, the finding of joint neglect; but that must be found, in seeking to impose the penalty prescribed by sec. 427 of the Railway Act.

I have said that no case for a joint offence could be made under sec. 221 of the Criminal Code, and that sec. 247 has no application to what is complained of here. The only other section is 165, and that expressly prevents the proceeding by indictment as here, because sec. 427 of the Railway Act provides the penalty and a mode of enforcing it.

For these reasons I would answer the first question in the negative, and say that a categorical answer to some of the others would not be proper, nor would any answer to any other questions be of practical advantage upon the case submitted.

GARROW and MACLAREN, JJ.A., concurred.

FARM CROSSING.

ONTARIO.]

[ANGLIN, J.]

TORONTO, HAMILTON & BUFFALO R.W. CO. v. SIMPSON
BRICK CO.

(17 O.L.R. 632.)

Railway—"Farm Crossing"—Dominion Railway Act, 1888, sec. 191—Construction—Heading and Side-note—Use of Crossing for Business of Brickyard—Agreement to Provide and Maintain Crossing—Reservation—Easement—Interference with Operation of Railway—Severance of Ownership—Cesser of Right.

Section 191 of the Dominion Railway Act of 1888 is not restricted in its application to crossings for farm purposes merely, notwithstanding the heading and side-note "Farm Crossings," which may be taken as descriptive of the character of the construction of the crossing, and not restrictive of the purposes for which it may be used or of the uses to which the lands crossed by the railway may be put, and notwithstanding the words of the section itself, "convenient and proper for the crossing of the railway by farmers' implements, carts and other vehicles," which may be similarly interpreted.

The defendants, as lessees of S., occupied and operated a brick-yard, in a city, on the north side of the plaintiffs' railway, and in connection with their business used a private lane over the property of M., lying to the south of the railway. This lane led to a street, and was the only means of access from the brick-yard to a public highway. To reach this lane the defendants used a crossing over the railway, and their right to do so was called in question by this action. When the railway was built, the land leased by the defendants and that owned by M. were the property of the Messrs. B., who in December, 1894, conveyed to the plaintiffs a right of way through their property, and obtained simultaneously with their conveyance an agreement by which the plaintiffs covenanted to provide and maintain "a farm crossing" at the point now in question, which was duly constructed. The Messrs. B. conveyed both properties to M. in 1901, and in 1903 F. acquired from M. the premises afterwards leased by the defendants. In his conveyance M. granted to F. a right of way over the lane opposite the crossing. S. acquired title from F. and subsequently leased to the defendants. The land leased by the defendants had been in use as a brick-yard for 25 years before 1893, but lay idle from that year until 1903, when S. established a brick-making industry upon it. The plaintiffs were aware that S. bought with the intention of using the crossing and the lane to the south as the means of conveying from his yard brick for local trade, and with this knowledge they reconstructed and kept in repair the crossing in question, which was used by S. and the defendants for that purpose, without objection by the plaintiffs, until 1906, when they complained of its use, and began this action in July, 1907:—

Held, that a railway company acquiring a right of way may take the land required subject to reservations in favour of the grantor of such rights of crossing or other easements as may be agreed upon, and are not inconsistent with the use of the right of way for railway purposes; an agreement for a crossing contemporaneous with the deed of the right of way is equivalent to a reservation in the deed itself; and, the vendors having made such an agreement, the character and extent of the right of crossing must be determined by the terms of that agreement. Subject to the question of severance, the covenant of the plaintiffs with the "vendors, their heirs, executors and administrators," enured to the benefit of the assigns or grantees of the vendors, including lessees of such grantees; and the use which the defendants were making of this crossing was within the rights conferred upon the Messrs. B. by the agreement of the plaintiffs, not being, upon the evidence, inconsistent with the safe operation of the railway. nor unduly increasing the burden of the easement created by the agreement.

Held, also, that, although when the right of crossing was created the lands on either side of the railway belonged to the same owners, and were now held by different owners, there was no such severance as would involve the ceasing of the right of crossing. *Midland R.W. Co. v. Gribble*, [1895] 2 Ch. 827, distinguished.

THIS was an action for an injunction against trespass. The facts are stated in the judgment.

The action was tried before ANGLIN, J., without a jury, at Hamilton, on the 30th November, 1908.

J. W. Nesbitt, K.C., for the plaintiffs.

A. M. Lewis, for the defendants.

January 8, 1909. ANGLIN, J.:—The plaintiffs sue for an injunction restraining the defendants from trespassing upon the plaintiffs' right of way and railway tracks. The defendants, as lessees of Mr. J. J. Scott, occupy and operate a brick-yard situate within the city of Hamilton, on the north side of the plaintiffs' line of railway between Hamilton and Brantford. In connection with their business the defendants use a private lane or right of way, 30 feet in width, over the property of one Maguire lying to the south of the plaintiffs' railway. This lane leads to Aberdeen avenue, and is the only means of access from the defendants' brick-yard to a public highway. To reach this lane the defendants use a crossing over the plaintiffs' railway, and this constitutes the trespass of which the plaintiffs complain.

When the plaintiffs' railway was built, both the lands now leased by the defendants and those now owned by Maguire were the property of Noah S. Briggs and Charles S. Briggs, as tenants in common. In December, 1894, they conveyed to the railway company its right of way through their property, and they obtained simultaneously with their conveyance an agreement by which the railway company covenanted to provide and maintain "a farm crossing" at the point now in question. The land now leased by the defendants had been in use as a brick-yard for some 25 years prior to 1893. From 1893 to 1903 it lay practically idle. The Messrs. Briggs conveyed both properties to Maguire in December, 1901. In March, 1903, one Fanning acquired from Maguire the premises now leased by the defendants. In his conveyance Maguire granted to Fanning a right of way, from Aberdeen avenue to the lands conveyed to him, over a strip of land 30 ft. wide and abutting at its northern end opposite the crossing provided and maintained by the railway company under the agreement of 1894. Fanning subsequently agreed to sell to Mr. J. J. Scott; and Mr. Scott has

leased the premises to the defendants with an option to them to acquire Mr. Scott's rights under his agreement with Fanning. The right of way is not specifically referred to in the two latter documents. It was evidently regarded as something which would pass with the land as appurtenant to it.

Though Fanning bought the property for the purpose of re-establishing a brick-making industry upon it, he did not make use of it. Before Mr. Scott bought, he negotiated with the railway company, through its superintendent, Mr. Fisher, for a siding. In these negotiations the crossing was not expressly referred to. Mr. Scott established an extensive brick-making industry on the property. The railway company built the siding arranged for, and also reconstructed the crossing, which they have since maintained in repair. For a year and a half no objection was taken to the use made of the crossing by Mr. Scott, which was similar in character and extent to the use which the defendants have made of it since they acquired the business. But early in 1906 the plaintiffs began to complain of the crossing being used for the purposes of a manufacturing business, asserting that it had been intended only for farm purposes. This action was begun in July, 1907.

While I do not deem it material, in case it should hereafter prove to be so, I find that the plaintiffs were aware that Mr. Scott intended to use the premises which he bought from Fanning as a brick-yard, and that he intended to invest a large sum of money in the business. I find that the plaintiffs, through Mr. Fisher, were fully aware that Mr. Scott bought with the idea of using the crossing in question and the lane to the south as the means of conveying, from his yard, brick intended for local trade, and which he should not ship out by the plaintiffs' railway. I find that it was because of this knowledge that they reconstructed and subsequently repaired the crossing in question.

This crossing and lane afforded, when this action was begun, the only means of egress from the Scott property to a public highway. Pending this litigation and with a view to facilitating a suggested settlement, a strip of land leading from the defendants' premises along the plaintiffs' railway to Aberdeen avenue, has been secured.

But this would afford a very poor and inconvenient mode of egress to the defendants, owing to a depression, some 60 feet deep, occurring upon it between the defendants' premises and Aberdeen avenue. Moreover, having regard to the circumstances under which this strip of land was acquired, a settlement not having been effected, I think the defendants are entitled to have this action disposed of as if they did not control this strip, although, in the view which I take, their control of it does not affect the right which they assert and defend.

In the present case it may be unnecessary to inquire what would be the purely statutory rights of the defendants or obligations of the plaintiffs, in the absence of any agreement respecting the right of crossing at the point in question. I assume—as the authorities seem to establish—that no prescriptive right of crossing and no such right by estoppel, can arise after the railway company has acquired its right of way, because it is apparently *ultra vires* of a railway company by express grant to confer such an easement: *Canada Southern R.W. Co. v. Town of Niagara Falls* (1892), 22 O.R. 41. Apart from agreement, and excluding highway crossings and crossings which the Railway Commission may now order, the only rights of crossing to which the right of way of a railway constructed under the Railway Act of 1888 (51 Vict. ch. 29) is subject, are those provided for by sec. 191 of that statute. But I know of nothing to prevent a railway company, when acquiring its right of way, taking the land required from its grantor, subject to reservations in his favour of such rights of crossing or other easements as may be agreed upon and which are not inconsistent with the use of the right of way for railway purposes: *McKenzie v. Grand Trunk R.W. Co.* (1907), 14 O.L.R. 671. An agreement for a crossing contemporaneous with the deed of the right of way to the railway company is, I think, equivalent to a reservation in the deed itself. Here the vendors obtained such an agreement, and the character and extent of their right of crossing the plaintiffs' railway must be determined by the terms of that agreement, which is in the form of a covenant by the railway company to provide and keep in repair "a farm crossing," etc., at a specified point. The crossing claimed by the defendants is at this point.

Subject to the question of severance dealt with below, the covenant of the railway company with "the vendors, their heirs, executors and administrators," enures to the benefit of assigns or grantees of the vendors, including lessees of such grantees. The first question for determination, therefore, is, whether the use which the defendants are making of this crossing is within the rights conferred upon Noah S. Briggs and Charles H. Briggs by the agreement of the plaintiffs.

This agreement recites the conveyance, by deed of even date, of part of the Briggs property to the railway company for the purposes of its railway, and an agreement by the railway company that "in consideration of the conveyance" it "should provide a crossing over and across the said lands so granted and conveyed." It proceeds: "Now this indenture witnesseth that the company hereby covenants and agrees with the said vendors to provide, and thereafter keep in repair, a proper and convenient farm crossing of a width of fourteen feet with two gates twelve feet in width, one on the northerly and the other on the southerly boundary of the said railway lands, the said crossing to be placed at or near station number four hundred and ninety-six in the company's line of railway."

It is noteworthy that while "farm crossing" is found in the operative clause, "crossing" alone is used in the recital. The terms "crossing" and "farm crossing" appear to be used indifferently and as interchangeable terms. Having regard to the facts that for 25 years before the railway was built the property to the north had been used almost constantly as a brick-yard and was unsuited for other purposes, and that the crossing was designed to furnish a means of egress from this land to Aberdeen avenue, it would seem that it was intended by this agreement to provide for a crossing for such purposes as the owners of this property might require, and not merely for a crossing restricted in its use to "farm purposes," in the ordinary sense of that phrase. Indeed, I think that the word "farm" may well be disregarded in construing the agreement, and that it may be read as conferring a right of crossing for all purposes for which the land cut off by the railway may profitably and con-

veniently be used. It would, in my opinion, defeat the intent of the parties to the agreement to hold that the use of the crossing must be confined strictly to farm purposes.

But if the word "farm" may not be rejected or ignored, then I would find that the term "farm crossing" was used by the parties as a convenient description of the right of crossing created by sec. 191 of the Railway Act of 1888.

In the Railway Act of 1888 two kinds of crossings and only two are provided for, viz., "highway crossings," and what are in the heading and side-note to sec. 191, though not in the section itself, termed "farm crossings." "Farm crossings" appears to be a term used in the statute in contradistinction to "highway crossings," and intended to cover all private rights of crossing to be enjoyed by "persons across whose lands the railway is carried," whatever may be the character of such lands or the use to which they are put. Having regard to all the circumstances in which the agreement here in question was made, as shewn by the evidence, it was intended, in my opinion, to confer upon the grantors to the railway company a right of crossing, in its nature and extent at least as great as that described under the caption "farm crossings" in sec. 191 of the Railway Act, the width of the crossing itself, and of the gates, and its precise location, being defined by the agreement. The phrase "a farm crossing," if not used as the equivalent of "a private crossing," as I think it was, was employed as a convenient and well understood phrase to describe the rights created by sec. 191 of the Railway Act, and these rights, at least, the agreement, upon its proper construction, in my opinion conferred on Noah and Charles Briggs.

For the plaintiffs it is contended that the right of crossing conferred by sec. 191 is restricted to such uses as are incident to the usual and ordinary requirements of a farmer. This question was mooted but not determined in *Plester v. Grand Trunk R.W. Co.* (1900), 32 O.R. 55, where it was held by a Divisional Court that the hauling of gravel from a farm to a highway was "a farm purpose," and the Court suggested that the hauling of timber cut from the land might be within "farm purposes." Possibly conveying from

the land brick made from clay found in it might also, upon a construction, liberal but not unreasonably so, of "farm purposes," be deemed to be covered by that phrase.

As already pointed out, sec. 191 made the only provision under the Act of 1888 for crossings over railways other than highway crossings. Railways are necessarily carried across many properties which are not farms in any sense of the word. The language of sec. 191 is that "every company shall make crossings for persons across whose lands the railway is carried, convenient and proper for the crossing of the railways by farmers' implements, carts and other vehicles." Unless these latter words are to be read as restricting the preceding general language of the section, and confining the use of every crossing provided under this section to farmers' implements, farmers' carts, and farmers' other vehicles, there is in the section itself nothing to warrant the view that it was intended to provide only for crossings for "farm purposes." On the contrary, the section extends to all lands across which the railway is carried. The word "farmers" applies necessarily only to the word "implements." It does not necessarily qualify the words "carts and other vehicles." But if it does, the phrase "convenient and proper for the crossing of the railway by farmers' implements, carts and other vehicles," describes not the uses to which the crossing may be put, but the kind of construction which the railway company was required to provide, that is, a crossing so built and arranged that it should afford a suitable passage for farmers' implements, carts, and other vehicles. Whatever the purpose for which the lands crossed by the railway are used, the owner shall not be entitled to require the company to provide or maintain any higher grade or better class of crossing than that so described. But it by no means follows that the use of the crossing is to be restricted to farm purposes.

Should the generality of the section as to the lands to which it applies be restricted by the caption and side-note "farm crossings"? In my opinion, it should not. The fact that if such a construction were to prevail many properties not farms would be left unprovided for and much valuable land cut off from access to street or highway

affords a cogent argument against it. That marginal notes are no part of the statute is well established. The function of the caption or heading appears to be similar to that of a preamble, *viz.*, to aid in explaining obscure, doubtful, or ambiguous language in the section or sections found under it (*Donly v. Holmwood* (1880), 4 A.R. 555, 560), but not to extend or restrict the scope of terms plain and unequivocal. The heading must often be regarded as "inserted for the purpose of convenience of reference, and not intended to control the interpretation of the clauses which follow:" *Union Steamship Co. of New Zealand v. Melbourne Harbour Trust Commissioners* (1884), 9 App. Cas. 365, 369.

"In this Act . . . unless the context otherwise requires . . . the expression 'lands' . . . includes real property, messuages, lands, tenements, and hereditaments of any tenure." The onus is certainly upon those who contend that "lands" in sec. 191, means "farm lands" only, to shew that it is inconsistent with the context to give to the word "lands" the wider meaning given it in the interpretation section: *ib.*

The distinction between cases such as *Eastern Counties and London and Blackwell R.W. Co. v. Marriage* (1860), 9 H.L.C. 32, in which the heading dealt with read, "And with respect to small portions of intersected land, be it enacted, as follows," and *Hammersmith, &c., R.W. Co. v. Brand* (1869), L.R. 4 H.L. 171, where the heading was, "And with respect to the construction of the railways and the works connected therewith, be it enacted as follows" (pp. 203 and 208), on the one hand, and, on the other, cases like that now under consideration, where the headings are not "so drawn as to be applicable grammatically to the sections which follow them," is pointed out in *Union Steamship Co. of New Zealand v. Melbourne Harbour Commissioners*, *supra*. In the former class of cases the heading is certainly intended to control the application of the sections under it, while in the latter class the heading rather appears to be inserted for convenience of reference, and its further office to be that it "may properly be . . . used for the purpose of construing any doubtful matter in the sections under that very heading:" *per* Brett, L.J., in *The Queen v. Local Government Board* (1882), 10 Q.B.D. 309, 321.

But the heading "farm crossings" is given full effect if it is taken to be descriptive of the grade or class of crossing which the railway company shall be obliged to provide. If there is anything obscure or ambiguous in sec. 191, it is found in the concluding words, "farmers' implements, carts and other vehicles." If the heading is looked at for the purpose of clearing up any doubt as to whether the qualifying word "farmers'" applies to "carts and other vehicles," as well as to "implements," it then fulfils its legitimate office. This may lead to the application of the qualifying word "farmers'" to all three subjects. But the whole phrase in which these words occur—"convenient and proper for the crossing of the railway by farmers' implements, carts and other vehicles"—is, as already pointed out, restrictive neither of the kinds of properties for which crossings must be provided nor of the uses to which such properties or crossings may be put, but descriptive of the sort and quality of crossing which the railway company must make. The heading "farm crossings" is given all the effect and influence to which it is entitled in the construction of the section, if it too is taken as descriptive of the character of the construction of the crossing, and not restrictive of the purposes for which it may be used or of the uses to which the lands crossed by the railway may be put. I see nothing to require construction of the words "for persons across whose lands the railway is carried," in a sense different from their plain and ordinary meaning.

No doubt, the vast majority of crossings which it was expected that railway companies would be required to make under this provision were crossings which may properly and with strict accuracy be called "farm crossings." This fact may account for the use of this term in the statute to designate the private crossings of whatever nature, for which it was intended to provide by sec. 191, in contradistinction to the public crossings designated "highway crossings" and provided for by secs. 183 to 190 inclusive. But I incline rather to the view that this heading was inserted as descriptive of the class and grade of crossings which the railway companies should be obliged to construct.

The corresponding section of the English Act, the Railway

Clauses Consolidation Act (1845), numbered 68, is so different in its terms that cases decided under it afford little assistance in construing sec. 191. It requires the company to make and maintain "for the accommodation of the owners and occupants of lands adjoining the railway, such and so many convenient gates, bridges, arches, culverts, and passages as shall be necessary for the purpose of making good any interruptions caused by the railway to the use of the lands through which the railway shall be made." If the plaintiffs' railway were constructed under such a statutory provision as this, I should entertain no doubt that, subject to the question whether the extent and mode of his user prevents or obstructs the working of the railway—*Great Northern R.W. Co. v. McAlister*, [1897] 1 I.R. 587—the defendants would, apart from agreement, be entitled to the right of crossing which they claim. Upon the construction of sec. 191 of our own Railway Act of 1888, I have been referred to no authority except the case of *Plester v. Grand Trunk R.W. Co.*, *supra*, and I have myself found no such authority. I have no hesitation in concluding that sec. 191 is not restricted in its application to crossings for farm purposes merely.

The evidence has not at all convinced me that the use by the defendants of this crossing is inconsistent with the safe operation of the plaintiffs' railway, or that it unduly increases the burden of the easement created by the agreement of 1894.

The plaintiffs sought to shew that the traffic over this portion of their line was very heavy, their train-master being called to state that 70 trains a day passed the crossing. But of these so-called trains, only 14 to 16 are passenger or freights trains, the rest being light engines and principally yard engines. Many of these trains run at night, when, of course, the crossing is not in use by the defendants. The crossing is within the city of Hamilton. The evidence is that about 10 waggons per day—one-half loaded, one-half empty—are driven over it. Except in a couple of instances in 1904, there is no evidence of any obstruction or delay of the plaintiffs' trains by the use made of the crossing. Since that time there has been no report of trouble. There apparently has been none since the defendants became lessees of the premises. There is not

in this case evidence such as was before the Court in *Great Northern R.W. Co. v. McAlister*, [1897] 1 I.R. 587, that a use is being made of the crossing for which it is unsuitable in construction, or that it is being used in any extraordinary manner or for cumbrous vehicles, such, for instance, as a traction engine. The plaintiffs have not shewn that the use made by the defendants of the crossing has seriously incommoded or inconvenienced them, if indeed mere inconvenience, short of obstruction to traffic creating a condition of danger inconsistent with the use of the railway, would suffice: they certainly have not established that it prevents or unduly interferes with or obstructs the working of the railway.

The premises now leased by the defendants had been in use as a brick-yard for 25 years before the railway was built. The land is unsuited for agricultural purposes, and it must have been in the contemplation of the plaintiffs that its use as a brick-yard might and probably would be resumed. As stated in the *McAlister* case, "every physical circumstance may be taken into consideration in determining now what was in the minds of the parties as to the future use of the crossing." The defendants are merely carrying on, perhaps on a somewhat more extensive scale, a business for which the premises were used before the railway was constructed. They have not, as was the case in *Great Northern R.W. Co. v. Talbot*, [1902] 2 Ch. 759, sought to use the crossing for conveying goods and traffic not originating upon the premises to which the easement is appurtenant. They have not unduly increased the burden of the easement by altering its character, nature, or extent. I do not know that they can be required to limit their use of the crossing to purposes for which the land was used before the railway was built: *United Land Co. v. Great Eastern R.W. Co.* (1873), L.R. 17 Eq. 158; but they are in fact exercising the right of crossing in a manner in which, upon the evidence before me, I think it was contemplated it should be exercised when the agreement of December, 1894, was made.

For the plaintiffs it is further urged that when the right of crossing was created, the lands on either side belonged to the same owners, Noah and Charles Briggs; that they are now held by different

owners—the defendants' lessor Scott or his vendor Fanning on the north, and Maguire on the south—and that therefore the right of crossing has ceased to exist; and counsel cited *Midland R.W. Co. v. Gribble*, [1895] 2 Ch. 827. There a severance, without reservation in favour of the land for which the easement was subsequently claimed of the easement itself, or of any right of way over the other portion of the land to the enjoyment of which the right of crossing would be necessary, was held to involve an abandonment of the right of crossing. The Court of Appeal, affirming the decision of Wright, J., rests its judgment distinctly upon the abandonment and release implied by the owner's severance "in such a way as to shew conclusively that this occupation way over the railway was no longer of any use to him, and to shew conclusively that he never intended to use it thereafter. . . . When he severed the land without any reservation of any right of way there was an end of the right of way over the railway—he abandoned his easement:" *per* Lindley, L.J., at p. 831. Here there was the grant by Maguire to Fanning, as appurtenant to the land to the north which Fanning bought, of the right of way over the strip 30 ft. wide leading from the railway crossing over Maguire's unsold land to Aberdeen avenue. *Midland R.W. Co. v. Gribble* is, therefore, as Mr. Lewis said, an authority supporting rather the contention of the defendants than that of the plaintiffs. There has not been in this case any such severance as would involve the cesser of the right of crossing.

The plaintiffs have entirely failed, in my opinion, to establish their right to the relief which they claim, and their action should therefore be dismissed with costs.

RIGHTS OF PASSENGERS—AUTHORITY OF CONDUCTOR.

ONTARIO.]

[RIDDELL, J.

BRAZEAU V. CANADIAN PACIFIC R.W. Co.

(Unreported.)

Passenger—Right to and removal from particular seat—Authority of conductor—Smoking car—Seat already taken and temporarily vacated by another—Assault—Rights of passenger—Damages—Costs.

The plaintiff, Brazeau, entered a smoking car of the defendant company and took a vacant seat although told by the persons sitting near that it was taken and vacated temporarily.

Upon his refusing to vacate the seat after having been, by the conductor, twice required to do so, the conductor removed him forcibly without using unnecessary force and placed him in the passageway pointing him to vacant seats.

Held, 1. That the plaintiff could not recover damages for an assault or removal from the seat; the conductor having full authority to determine what seat a passenger is to occupy.

2. That railway companies are not bound to furnish smoking cars or any particular description of car beyond what the passengers' ticket calls for.

THIS was an action tried at Ottawa on the 6th of January, 1908, to recover damages for an assault upon the plaintiff by a conductor in charge of a train of the defendants, and for removing plaintiff from a seat in a car which he had lawfully taken, as he alleged.

A. Lemieux, Ottawa, for plaintiff.

W. H. Curle, Ottawa, for defendants.

The facts of the case are fully set out in the judgment of the learned trial Judge.

January 13, 1908. RIDDELL, J.:—This case, tried by me without a jury at Ottawa, Jan. 6th, 1908, raises a question which it appears is new—though of considerable public interest and importance.

A party of five gentlemen associated in business were travel-

ling from Montreal to Ottawa on the Canadian Pacific Railway and from near Montreal had all been sitting together in the smoking car conversing about matters of common interest to themselves, but of none to any one else. One of them, Mr. F., required to go to the lavatory and left his seat. No baggage or clothing was left to indicate that he intended to return, though he did so intend.

While he was in the lavatory the train stopped at a station and the plaintiff, a mining prospector, got on. Coming into the smoking car and seeing Mr. F.'s seat vacant, he went to this seat and sat down. Before sitting down he was told that the seat belonged to another who was in the lavatory, and was asked to take another seat which was vacant. Whether there was something in the state of his health or his business which rendered him disregarding of the ordinary courtesies of life, or whether it was simply that the plaintiff is by nature or education rude and ill-mannered, does not appear. Whatever the cause he refused to comply with this most usual and reasonable request—he said he did not care and insisted upon occupying the seat. Shortly afterwards Mr. F. returned and—naturally—wanted his seat—he pointed out to the plaintiff that there were other vacant seats (perhaps only one) in the car which he might take, and it was explained to the plaintiff that the five gentlemen were together and were discussing matters in which they had a common interest, and he again was asked to take another seat. He again refused and said that F. might take another vacant seat. F. went to another car and appealed to the conductor, who came and examined into the matter and told the plaintiff that he must give up the seat. The conductor at the time shewed him the vacant chair or chairs (it is not quite clear whether there was only one or whether there were two vacant chairs). The plaintiff again refused to vacate the chair and said that F. ought to take the other place. The conductor went away for a time supposing that the plaintiff might think better of it; on returning after a few minutes and the plaintiff again refusing, he took him by the lapels of the coat and “*molliter manus imposuit*” gently lifted

him from the chair, placed him in the passage way and pointed him to the vacant chair or chairs.

The plaintiff now sues for \$1,000 damages. He claims that he had an absolute right to take any vacant seat in the car and no one had any right to interfere with his possession of a seat once occupied by him—and he claims further that the railway company are liable for the acts of the conductor.

To the latter proposition I entirely assent—it is quite beyond question that the employers, the railway company, are liable for the acts of the employee, the conductor, while he is acting in the course of his employment, however improper such acts may be. To the cases cited in “The Laws of England,” vol. 1, 212, may be added *Hammond v. Grand Trunk R.W. Co.* (1904), 9 O.L.R. 64, 4 Can. Ry. Cas. 232.

Then as to the rights of the plaintiff—it makes no difference that he acted, as I find that he did, rather to annoy the former occupant of the seat and his friends, than for any other reason. The law cannot consider the object and purpose of the action of any person who is acting within his rights. *Mayor & Corporation of Bradford v. Pickles* (1895), A.C. 587; *Ruetsch v. Spry* (1907), 14 O.L.R. 233.

And the plaintiff, if he was within his rights must be regarded as one of those “men” so much lauded by the distinguished poet-judge as constituting a state “who know their rights and knowing dare maintain”—and his rights against the railway company are none the less that his manner toward his fellow passengers was that of an ill-conditioned and selfish boor.

Much of our law has been made by those insistent upon their rights in trivial matters, and much of the improvement in public conveniences of all kinds including railways, steamboats and hotels is due to those who will not submit to be fobbed off with less than they are entitled to. Such persons perform a public service of no little value and are no less entitled to the thanks of the general public because they are usually called by a somewhat less dignified appellation than that made use of by Sir William

Jones—or because it is seldom that a distinguishing characteristic of their manner is “sweetness and light.” I confess to a secret admiration for such people, and would wish that there were a more common uprising against bad air, bad water, poor food and poor accommodation generally. The assertion of a supposed right against a fellow passenger to his inconvenience and annoyance stands on a different plane from the assertion of such a supposed right against a common carrier or other public servant—the first may be and generally is to be deprecated, the latter is generally commendable.

If then I could come to the conclusion that the plaintiff was right, though I should not be able to give him large damages, I certainly should give him his costs on the High Court scale.

But is he right?

I might dispose of this case upon the short and simple ground that the plaintiff had no right to be in the smoking car at all.

By the Railway Act, R.S.C. 1906, ch. 37, sec. 284, a railway company “shall according to its powers furnish adequate and suitable accommodation for the receiving and loading of all traffic offered for carriage upon the railway; furnish and use all proper appliances, accommodation and means necessary for receiving, loading, carrying . . . such traffic.” The Board of Railway Commissioners are given powers in the same section, sub-sec. 3, to order the company to furnish such accommodation if they are of opinion it has not been furnished, and the Board “may prohibit or limit the use, . . . of any . . . cars, rolling stock, . . . or any class or kind thereof, not equipped as required by this Act, or by any orders or regulations of the Board.” “Traffic” includes “the traffic of passengers” sec. 2(31). Anyone when buying a first-class ticket is entitled to have the company furnish him with “adequate and suitable accommodation” as such first-class passenger—and that means accommodation in a first-class car. There is no obligation on the part of a railway company to furnish smokers with a smoking car, or with accommodation for smoking any more than to furnish accommodation for playing bridge or for curling the

hair, or for shaving. The custom of putting smoking cars on trains is no doubt very common, but it is by no means universal; and while a concession to the smoker and intended for his comfort it is not compulsory on the company. (It is well-known that for years after the institution of railways in England, smoking was forbidden both on trains and at stations. See Synge, *Social Life in England*, pp. 357, 358.) The company for purposes of their own adding a smoking car to a train do not thereby become liable to allow any one to enter it—nor because the company allow one man or body of men to enter and use such a car, do they become bound to allow another man or body of men to do the same.

In some of the United States of America it has been considered that a common carrier like a railway company may not discriminate between its passengers. Elliott on Railways, vol. 1, 200—but such is not the law here. No passenger can complain if he gets or is offered all his contract entitles him to, even though others who have no other contract receive more.

If then the plaintiff had no right in the smoking car at all, he could not complain against the company if he was not allowed to remain in any particular part of it. While he was not in any sense a trespasser, all the accommodation he could legally ask in the smoking car was such as the company saw fit to give him.

But I prefer to base my conclusions upon a broader principle. Whether at the common law or by statute the railway company is bound—holding itself out as a common carrier—to find room for all who offer themselves as passengers and in general to find seats for all passengers. *Hawcroft v. Great Northern R.W. Co.*, 21 L.J.Q.B. 178; 5 Am. & Eng. Ency. (Law 2nd ed.) 590, 6 Cyc. p. 582 2(C); *Davies v. Kansas*, 50 Mo. 317; R.S.C. (1906), ch. 37, sec. 284.

But unless the seats are numbered and a ticket is bought for a seat so numbered, or unless a ticket is bought for a particular seat identified in some other way, there is no right to occupy any particular seat. It is precisely like the case at an inn. Every one (speaking generally) is entitled to be received at a common

inn, but unless he so contracts he has no right to any particular room or bed or seat at the table. If any one were to enter into an inn and take possession of a vacant room he could not complain if the proprietor told him that that room was reserved for some one else, and while he would no doubt be well within his rights if he took any vacant chair at the tavern dinner table, he could not complain if the landlord were to require him to move to another. It often happens that a permanent boarder or frequent customer of an inn becomes a kind of fixture at a particular part of the table, and surely the landlord has a right to direct that such a place be kept for him.

In *Claypool v. McAllister* (1858), 20 Ill. 504, it was held that a common carrier being a ferryman, has an absolute right to direct what position each person shall take on the boat without reference to the priority of arrival at the ferry. See also *Pittsburg, etc. v. Van Houten*, 48 Mo. 90, in which case the passenger demanded a seat in a particular car and it was held that he had no right to it.

Then the plaintiff, buying a first-class ticket, is entitled to a seat and, I shall assume, to a seat in the smoking car (though as I have said I do not think that is the case). But the seats were not numbered and the only right the plaintiff had was to have some seat and not any particular seat. What seat he was to have must be determined by the railway company through their servant the conductor. Rule 189 makes it the duty of the conductor to "fully control" and "conduct the trains and passengers." The conductor was within his rights in determining that the plaintiff should not occupy the seat of which he had taken possession. So long as the conductor had not directed him to vacate that seat it may be that he was not beyond his right, but the moment the conductor determined that he should not occupy that seat and expressed to the plaintiff such determination, it was the duty of the plaintiff to give way.

It would indeed be intolerable if the law were different—there must be some authority to determine and to determine on the spot between two persons contending over a seat and that

authority can only be the conductor who is "to control and conduct the passengers."

It seems to me that the same result would be reached if I gave effect to the argument of the plaintiff that the passenger upon entering has the right to take any seat which he sees vacant and may hold it. F. had already chosen the seat in question, and had not given it up. His retiring for a temporary purpose was not an abandonment of the seat—it would be absurd in my view to consider that the fact that a passenger left his seat to get a drink or to wash his hands or to buy a newspaper or to send a telegram should be considered as shewing an abandonment of the seat he had been occupying and intended further to occupy. It has recently been decided in England in a case to which I am unable at present to find the reference, that one leaving a seat for a temporary purpose at a station does not give up his right to the seat. In that case there were some personal effects left in the seat to indicate the continued occupancy, but if something of that kind is necessary (and as at present advised I think it is not) it was supplied by the statement made to the plaintiff at the time he was about to sit down, that the seat was in use.

I do not decide this case on any such ground, but on the broad ground mentioned.

I have no regret in so deciding. Railway companies are held, and rightly held to a strict account as to the manner in which they perform the duties for which they are given extraordinary privileges. They have and they must have full power to make all reasonable regulations needful to enable them to perform these duties—they must remain masters of their own conveyances for the sake of the public. That intolerance of personal restraint so characteristic of our age and clime cannot be permitted to interfere with the company's management of its traffic, and the people at large must benefit by an orderly management of such traffic by those who are responsible for it. Someone must be charged with such management and that duty is best left with the company, and as conductors are charged with duties "of the

most delicate and responsible character'' and must act at once, it is gratifying to know that in some cases even the complaining passenger can find no fault with an officer of this kind. The plaintiff expressly repudiates any suggestion that the conductor (supposing the plaintiff had not an absolute right to the seat) did anything but what he should do—no excess is claimed—the whole question is one of strict legal right.

If the plaintiff was right, his damages I assess at \$5.40—\$5 for personal injury and 40 cents for mending his torn coat. He should, if I am wrong as to my view of the law, be awarded \$5.40 and costs on the High Court scale. But as I am of the opinion that he fails upon the law, the action will be dismissed with costs.

(See 11 O.W.R. 136.)

CONTRIBUTORY NEGLIGENCE—DISOBEDIENCE TO RULES.

ONTARIO.]

[RIDDELL, J.

RUDDICK V. CANADIAN PACIFIC R.W. CO.

(Unreported.)

Master and servant—Injury to servant and consequent death—Collision—Engine driver—Disobedience to rules—Contributory negligence—Locomotive and train in good working order—Evidence—Negligence of fellow servants.

The deceased an engine driver in the employ of the defendants while driving a train was killed in a rear end collision between his locomotive and a train in front caused by his disobedience to rules, either in not seeing the danger signal or if he did, in not stopping his train.

Held, 1. That the engineer was the author of his own misfortune and his widow could not recover damages from the defendants for his death.

2. That the negligence of his fellow servants did not better the condition of the servant in fault.

ACTION for damages for the death of plaintiff's husband by alleged negligence of defendants tried at Ottawa on 11th January, 1908.

A. E. Fripp, Ottawa, for the plaintiff.

G. T. Blackstock, K.C., and W. H. Curle, Ottawa, for the defendants.

The facts of the case are fully set out in the judgment of the learned trial Judge.

January 11, 1908. RIDDELL, J.:—This is a case tried before me at the assizes at Ottawa, the jury having been dispensed with by consent.

Edward Ruddick, the husband of the plaintiff, and a locomotive engineer of some experience, was on the 20th June, 1907, called upon to drive engine No. 53 from Ottawa eastward toward Montreal with a special freight train. The engine had been for several years in use, and had been many times in the repair shops; but I cannot find that it was not on the day in question in good working order, an efficient locomotive engine. The air pump with which the engine was fitted was of the 8-inch type now becoming rather antiquated, but still, at least for that engine, sufficient. The rules of the road (p. 33) provide that both the conductor and the engineer are responsible for seeing that the brakes are in perfect working order throughout the whole train before starting from terminal stations, and accordingly, Ruddick, with another, tested the air brakes before starting out and found them working satisfactorily. Several times during the run the air brakes required to be used and at all times they acted without defect. So much is not disputed.

What immediately preceded the accident about to be spoken of is detailed by the conductor, brakesman and fireman upon the train. The plaintiff's counsel is not satisfied with their account, and claims that the facts have not been fully disclosed . . . ; but I am precluded from mere guessing and must accept the evidence. I am not dissatisfied with either the manner or the matter of such evidence, but am convinced that the facts are practically as the trainmen have deposed. Accepting, then, this evidence, this is what happened. Approaching a diamond crossing near Lachute, Ruddick applied the air brakes and slowed the speed of the train to about 10 miles per hour; after passing over the crossing the brakes were released and

about 300 or 500 feet from the crossing again partially applied—the engineer remarking to his fireman that now they would make for the hill. By this he meant that they would soon increase their speed down the grade they were then upon, to acquire momentum to climb the up grade about a mile or a little more ahead of them. After proceeding thus for perhaps a mile or so, the engineer shouted “Good bye” to the fireman and immediately put on the brakes to the full extent and reversed his engine. This last was a useless action but seems to be almost instinctively done by engineers of old standing in cases of extreme emergency. And the emergency was extreme. Almost immediately afterwards the engine crashed into the rear end of a train standing upon the track. This train was protected by its own red lights and by a red semaphore light. These were visible at least three-fourths of a mile away and should have been seen by Ruddick. The collision was fatal to the engineer, who died very shortly after, not, however, without having said “I saw them.”

It is argued that there must have been some defect in the brakes. That, I am unable to find. The brakes had been tested before the run began, they had worked well several times during the run; and if the engineer had found that they were not working he should have given the proper signal in order that the hand brake might be applied. Nor does there seem to have been any defect in the air pump. The accident was caused by the failure of the deceased to see the danger signal; or if he saw it in time, by his unaccountable failure to stop his train. In either case he disobeyed the rules of his company and those of ordinary prudence.

It is argued, however, that the rules of the company provide that the conductor and fireman must also look out for signals; that the conductor has a “valve” in his caboose, and that, if he had done his duty, he would have seen the signals and applied this valve (Rules, pp. 22, 34) and so prevented the accident. The conductor had, shortly before the accident, in fact, placed the train under the charge of the engineer, telling him

to run straight on if he found it safe; he had then gone to the caboose to attend to his clerical duties. The fireman was in the act of sweeping out his cab, and therefore he did not see the danger signals. Whether either of these employees could recover damages from the company under the circumstances, I need not consider. *Hastey v. C.P.R.*, unreported, seems against such contention; but it is from the authorities clear that, even if the other employees neglected their duty, the accurate performance of which would have prevented the accident, the position of one who is killed or injured while and as a consequence of disobeying the rules laid down for his guidance is not thereby bettered.

Deyo v. Kingston & Pembroke R.W. Co. (1904), 8 O.L.R. 588, 4 Can. Ry. Cas. 42, a decision of the Court of Appeal, is conclusive that such is the law.

The result is that the unfortunate engineer is the author of his own misfortune, and his widow, therefore, cannot succeed in this action.

Action dismissed with costs if asked.

(See 11 O.W.R. 130.)

ONTARIO.]

[DIVISIONAL COURT.

WALKER v. WABASH R.W. Co.

(18 O.L.R. 21.)

Railways—Collision—Negligence—Rules of Railway Company—Construction of Rules—Functions of Jury.

In an action for damages for the death of an engine driver of the Grand Trunk Railway Co., whose train came into collision with a train of the defendant railway, it was contended by defendants that the accident happened through the negligence of the deceased in disobeying certain rules of his employers. Questions were put to the jury as to the negligence of the defendants and contributory negligence of the deceased:—

Held, that there must be a new trial, because the jury should also have been asked whether the deceased had obeyed the rules of his employers applicable to the circumstances under which he was placed at the time of the accident, and whether but for that disobedience the accident would have happened. It is for the trial Judge to interpret such written rules of railway companies, subject to this, that it is for the jury to determine the meaning of technical terms used in them on the explanatory evidence offered.

THIS was a motion by the defendants to set aside the judgment pronounced on April 18th, 1908, by Magee, J., after the trial of the action before him, with a jury, at St. Thomas, on the 17th and 18th of that month, in favour of the plaintiff, with damages, and for a nonsuit, and in the alternative to reduce the damages by the amount of a policy of accident insurance which was carried by the husband of the respondent.

The motion was argued on October 27th, 1908, before MEREDITH, C.J.C.P., MACMAHON and TEETZEL, JJ.

H. E. Rose, K.C., for the defendants, contended that the plaintiff should have been nonsuited on the ground of joint negligence by the deceased, who broke the rule by which he should have governed himself: *Harris v. London St. R.W.* (1907), 10 O.W.R. 302, 39 S.C.R. 398; and that, apart from any rule, the evidence shewed that the deceased was not acting reasonably. He also referred to the judgment of Meredith, J.A., in *Harris v. London St. R.W.*, reported only in vol. 304 Supreme Court Cases (Osgoode Hall Library), at p. 62; *Deyo v. Kingston and Pembroke R.W. Co.* (1904), 8 O.L.R. 588; *Holden v. G.T. R.W. Co.* (1903), 5 O.L.R. 301, 306; *G.T. R.W. Co. v. Birkett* (1904), 35 S.C.R. 296.

J. B. Davidson, for the plaintiff, contended that the defendants' signals shewed that the main line was clear, and that the plaintiff's train was a schedule train and bound to make up time; and that rule 218 had no application. He referred to *Scriver v. Lowe* (1900), 32 O.R. 290; *Morrow v. Canadian Pacific R.W. Co.* (1894), 21 A.R. 149; *Great Western R.W. Co. v. Brown* (1879), 3 S.C.R. 159.

Rose, in reply.

January 11, 1909. MEREDITH, C.J.:—The respondent is the widow of John James Walker, who was killed on January 2nd, 1908, in a collision between his train and a train of the appellants, and she brings her action to recover compensation for his death, and it is brought for the benefit of herself and her deceased husband's father and mother.

The deceased was a locomotive engineer in the employment of the Grand Trunk R.W. Co., and at the time of his death was in charge of a locomotive which was pulling a regular schedule train of that company, which I shall afterwards refer to as Jackson's train, and proceeding westward from Fort Erie to St. Thomas. This train passed through the station grounds at Tillsonburg without stopping, and when it had reached a point on the line about one hundred yards east of a bridge crossing Otter Creek, about 3.20 a.m., came into collision with a train of the appellants, consisting of two engines and several cars, running from Corinth, the next station east of Tillsonburg, to the latter place.

This train had formed part of a train of the appellants which I shall hereafter refer to as Lawton's train, the remainder of which had been left, and at the time of the collision was lying on the north siding at Tillsonburg, having been separated from it in order that it might proceed to Corinth; and there was at the same time another train on the south siding.

The Lawton train was divided in obedience to instructions received by the conductor of it to double to Corinth, to which I shall afterwards refer, which meant that he was to divide his train, take part of it to Corinth, and then return to Tillsonburg and take the remainder to the same station.

The number of Jackson's train was 93. Lawton's train was not numbered, but is referred to in the train orders as extra west engines 1392 and 1125 coupled.

Lawton's train was under orders to run ahead of Jackson's, and of first No. 91 train; but, according to the testimony of Jackson, he was not made aware of the order. When Lawton's train arrived at Tillsonburg he was much behind time, and he there received a telegram from the despatcher at St. Thomas in these words: "What is the matter; you are making such slow time. Can you not handle train," to which the conductor replied: "On account of bad rail and train frozen up at Courtland will be unable to get over grade without doubling to Corinth. Please advise what to do." In reply to this the order

to double to Corinth, to which I have referred, which reads: "Double to Corinth then and get out of there at once with half of your train," was received by Lawton at Tillsonburg. According to Jackson's testimony, he received a verbal order from the operator at Nixon Station to go ahead of train 91, which up to that time he had been following, and communicated this order to the deceased, and his train accordingly left Nixon ahead of train 91.

The Canadian Pacific Railway crosses the line of the Grand Trunk R.W. Co. about half a mile east of the station building at Tillsonburg, and there is at this crossing an interlocking switch. Before going over the crossing the deceased shut off steam and lessened the speed of his train, so that, according to Jackson's testimony, it passed over at a speed of from fifteen to twenty miles an hour; according to the same testimony, the deceased then increased the speed to about thirty-five miles an hour, at which rate the train was going when it passed through the station grounds, and when it had reached a point a short distance east of the cattle-pen shewn on the plan, he (Jackson) noticed that the part of Lawton's train which was lying in the north siding was not headed by an engine, and was about to apply the brakes, when the emergency brake on the engine was applied in an effort to stop the train, but without success, as the train, though its speed was lessened, went on a further distance of about seventeen hundred feet, when the collision occurred, its speed being then about twenty miles an hour.

According to Jackson's testimony, when his train had gone over the diamond at the crossing, everything in sight indicated that the track ahead was clear, and on the rear part of the portion of Lawton's train, which was in the north siding, were displayed green lights, which indicated that it was in clear of the main line.

Jackson also testified that when a train had to wait in the through siding at Tillsonburg, it was the practice to detach the engine, for the purpose of its being moved on to the water tank to take water, the object of this being to save the time

which would be consumed if the taking of water was delayed until the train which was being met was passed. This evidence, which was brought out by the respondent's counsel, was intended to shew that it did not follow from seeing a train not headed by an engine on a siding that the engine was not on the siding ahead of its train, waiting to take water or taking water at the tank.

The appellants and the Grand Trunk R.W. Co. operate trains on the same line, which is a single track railway.

The contention of the respondents at the trial was that the collision was caused by the negligence of the conductor of Lawton's train in not sending out a flagman or seeing that proper lights were displayed on the rear of the part of that train, which was lying in the siding, to warn trains approaching from the east not to pass Tillsonburg; by the negligence of the brakeman in not so going out, and of the conductor in not asking for orders from the train despatcher at Corinth to return from Corinth to Tillsonburg.

The appellants' contention was that, according to the rules governing the deceased and the movements of his train, it was his duty to approach a station prepared to stop, and not to proceed until the switches and signals were seen to be right or the track was plainly seen to be clear; that it was also his duty not to proceed if a train, not headed by an engine, was upon the through siding at the station; that the deceased had disregarded this duty; that he had not approached the Tillsonburg station prepared to stop, but at such a speed as prevented him from bringing his train to a stop when he saw that the part of the train which had been left at Tillsonburg and was lying in the north siding was not headed by an engine, and that this failure of duty was the cause of the collision.

In support of the appellants' contention, reliance was placed upon two rules of the Grand Trunk R.W. Co., both of which, it was argued, had been violated by the deceased.

One of these rules, No. 213, reads as follows:—

"213. All trains must approach stations, the end of double

track, junctions, railroad crossing at grade, and drawbridges, prepared to stop, and must not proceed until the switches or signals are seen to be right, or the track is plainly seen to be clear.

"Where required by law, all trains must stop."

The other rule is No. 218, and reads as follows:—

"218. If a train parts while in motion, trainmen must use great care to prevent the detached parts from coming into collision. Enginemen must give the signal as provided in rule No. 165, and keep the front part of the train in motion until the detached portion is stopped.

"The front portion will have the right to go back, regardless of all trains, to recover the detached portion, first sending a flagman with danger signals a sufficient distance in advance in the direction in which the train is to be backed, and running with great caution, at a speed to insure absolute safety. On single track all the precautions required by the rules must also be taken to protect the train against opposing trains. The detached portion must not be moved or passed around until the front portion comes back. This rule applies to trains of every class.

"When it is known that the detached portion has been stopped, and the whole occurrence is in plain view, no curves or other obstructions intervening, so that signals can be seen from both portions of the train, the conductor and engineman may arrange for the re-coupling, using the greatest caution."

The contention of the respondent was that the position of the order board at the station and of the semaphore at the west end of the sidings and the lights displayed on the rear end of the portion of Lawton's train which was in the north siding indicated that Lawton's train was in the siding clear of the main line, and that the main line was clear, and that the absence of a flagman to warn Jackson's train that the forward portion of Lawton's train was still on the main line was a further intimation to the deceased that the main line was clear.

The respondent's counsel also contended that it was Lawton's duty, when he reached Corinth, to communicate to the operator

at that station the intended movements of his train, in which case it was contended that the operator at Tillsonburg would have been advised of them and would have displayed his order board, so as to warn the deceased to stop there.

The questions submitted to the jury and their answers, so far as they are material to our inquiry, are as follows:—

Question 1. Were the defendants guilty of any negligence which caused the death of John James Walker?

Answer. Yes.

Question 2. If so, wherein did such negligence consist?

Answer. By not displaying red markers at rear end of Lawton's train. By not sending out flagmen the required distance for safety. By conductor Lawton not asking for orders from despatcher to return from Corinth to Tillsonburg.

Question 3. What person or persons, if any, in the service of the defendants was or were guilty of such negligence, and what position did each occupy in the defendants' service?

Answer. The conductor and rear brakeman of Lawton's train.

Question 4. Could John James Walker by the exercise of reasonable care have avoided the injury which caused his death?

Answer. No.

A great mass of testimony was given at the trial, and witnesses were allowed, notwithstanding objection by counsel, to give their opinions as to the meaning of the two rules to which reference has been made, and as to the duty of the deceased and of Lawton in the circumstances of the case, and it is very difficult, if not impossible, to separate statements of the witnesses as to the practice followed in the operation of trains apart from the written rules, from what were merely expressions of opinion as to the meaning of the rules.

An instance of this is the opinion given by witnesses as to the meaning of rule 218, especially that part of it which refers to the detached portion of a train being "moved or passed around," which was said to mean that another train must not pass a train not headed by an engine lying in a siding; another instance is the opinion given as to the meaning of "approach stations" and "prepared to stop" as used in rule 213.

It was for the trial Judge to interpret and to instruct the jury as to the meaning of the written rules, though, no doubt, parol evidence was admissible to explain, and it was for the jury to determine the meaning of technical terms used in them. The function of the jury was, however, at an end when the meaning of such terms had been determined, and it was for the trial Judge finally to decide what the meaning of the rules was.

As was said in *Neilson v. Harford* (1841), 8 M. & W. 806: "The construction of all written instruments belongs to the Court alone, whose duty it is to construe all such instruments as soon as the true meaning of the words in which they are couched and the surrounding circumstances (if any) have been ascertained as facts by the jury, and it is the duty of the jury to take the construction from the Court, either absolutely, if there be no words to be construed as words of art or phrases used in commerce, and no surrounding circumstances to be ascertained; or conditionally, when those words or circumstances are necessarily referred to them" (page 823).

The case was submitted to the jury as one in which the questions were as to negligence of the appellants' servants and contributory negligence by the deceased. The proper questions, in addition to that of negligence of the appellants' servants, as it seems to us, were whether the deceased had disobeyed the rules of his employers, and whether but for that disobedience the accident would have happened, for, though the contention of the respondent as to negligence of the appellants' servants was well founded, if, notwithstanding that negligence, but for the deceased's disobedience of the rules the accident would not have happened, the respondent must fail.

For the protection of their property and of their employees and of persons and property being transported over their railway, the Grand Trunk R.W. Co. had provided double safeguards, one by the regulations affecting persons in the position which the deceased occupied, and the other, persons in the position which Lawton occupied, and the failure of Lawton to obey the regulations governing his conduct was, of course, no excuse for

the deceased disobeying the regulations by which he was governed, and neither would be entitled to recover for an injury occasioned by his own negligence or by the combined negligence of both.

Much depends upon the meaning of rule 213. Its provisions are somewhat vague, for there is nothing in terms defining what is meant by "approach stations" or by "prepared to stop" or by "stations."

In construing the rule regard should, of course, be had to the object which it was designed to serve, so far as that can be gathered from the rule itself, and if it was the duty of the deceased not to have passed the portion of Lawton's train which was lying in the north siding, it may well be that the rule is to be interpreted as meaning that it was his duty, when approaching Tillsonburg, to have had his train under such control that if what did actually happen in this case occurred, he would be able to bring it to a stop before passing beyond the point where the sidings join the main line, and that notwithstanding that that line appeared to be clear and that the signals and other conditions indicated that it was clear.

If what has just been mentioned was the duty of the deceased under rule 213, he was guilty of a breach of that rule, and it may well be that but for that breach the accident would not have happened; but if that was not his duty, it may well be that, assuming the facts to be again found as to the appellants' negligence as they have been found, the deceased was guilty of no breach of duty in proceeding as he did through the station at Tillsonburg.

We do not think that rule 218 has any application. It deals with the case of a train parting while in motion, but not with the case of a train being designedly cut in two in order that such an operation as that in which those in charge of Lawton's train were engaged may be effected. The detached portion which is not to be moved or passed around is plainly the detached portion of a train which has parted while in motion.

If there be such a duty as it was contended rule 213 creates, it must depend not upon that rule, but upon some other written

rule or the well-known practice adopted in the operation of the trains of the Grand Trunk R.W. Co.

Upon the whole, we think that the trial was not a satisfactory one, and that there must be a new trial in order that all questions of fact necessary for determining the rights of the parties may be found by the jury, after proper instructions as to the construction to be placed on the written rules, to use the language of the Court in *Neilson v. Harford*, either "absolutely" or "conditionally."

We say nothing as to the question of the right of the appellants to have deducted from the damages assessed the amount of the accident insurance which the deceased carried, and which it is said was received by his widow.

The facts as to this insurance were not brought out fully at the trial, and we think it better not to express an opinion as to that question now on a hypothetical state of facts, or on the facts as stated in the affidavits filed by the appellants in support of their motion, especially as no additional expense and no inconvenience will be occasioned by taking that course, the deduction being a mere matter of calculation, if the appellants are right as to the law and the facts on this branch of the case.

The appeal will therefore be allowed and a new trial had, and the costs of the former trial and of the appeal will be costs in the cause, unless the Judge before whom the action is retried otherwise directs.

NOTE: This case was subsequently settled.

END OF VOL. 8.

DIGEST OF CASES.

AGREEMENT.

Construction of — Exemption from Liability for Damages — “Property” Meaning of — General Words.] — See CONTRACT.

Exemption from Liability — “Property,” Meaning of.] — See CONTRACT.

Farm Crossing — Severance of Ownership — Interference with Operations of Railway — Change of Character of Crossing.] — See FARM CROSSING, 3.

Reduced Rates — Adequate Consideration — Undue Preference — “Similar Circumstances and Conditions” — Jurisdiction of the Board.] — See DISCRIMINATION, 1.

Validated by Special Act — Compensation — Arbitration — Jurisdiction of Board.] — See RUNNING RIGHTS.

AMENDMENT.

Pleading — Trial by Jury.] — See NEGLIGENCE, 9, 10.

Trial — By-law Fixing Tolls — Non-approval — New Trial.] — See TOLLS, 1.

ANIMALS.

See CATTLE AT LARGE.

APPEAL.

Compensation — Taking of Land — Award — Interest on.] — See EXPROPRIATION, 3.

Order of Board — Co-ordinate Jurisdiction of the Court — Enforcement of — Stay of Proceedings.] — See BOARD OF RAILWAY COMMISSIONERS, 3.

ARBITRATION.

Award — Setting Aside — Compensation — Damages to Land Remaining.] — See EXPROPRIATION, 1.

Compensation — Appeal from Award — Interest.] — See EXPROPRIATION, 3.

Costs — Taxation — Arbitrators’ Fees — Counsel Fees — Expert Witnesses.] — See EXPROPRIATION, 4.

Damages — Compensation — Payment into Court — Costs.] — See EXPROPRIATION, 5.

Fees — Taxation of.] — See EXPROPRIATION, 4.

ASSAULT.

Passenger — Removal from Seat — Authority of Conductor — Damages — Costs.] — See CARRIERS OF PASSENGERS.

AWARD.

Appeal from — Interest on Amount Awarded.]—See EXPROPRIATION, 3.

Arbitration — Compensation — Damages to Land Remaining.]—See EXPROPRIATION, 1.

BOARD OF RAILWAY COMMISSIONERS.

1. *Jurisdiction — Location of Railway—Consent of Municipality — Crossing — Leave of Board — Discretion.*]—On 12th of August, 1905, the Township of Sandwich West passed a by-law authorizing the W., E., etc., Ry. Co. to construct its line along a named highway in the municipality, but the powers and privileges conferred were not to take effect unless a formal acceptance thereof should be filed within thirty days from the passing of the by-law. Such acceptance was filed on 12th of September, 1905. This was too late and on 20th of July, 1907, the council of Sandwich West and that of Sandwich East respectively passed by-laws containing the necessary authority.

In April, 1906, the location of the line of the E. T. Ry. Co. was approved by the Board. In June, 1906, the Board made an order allowing the W. E., etc., Ry. Co. to cross the line of the C.P.R. In March, 1907, another order respecting said crossing was made and also an order ap-

proving the location of the W. E. Ry. Co., the municipal consent being obtained three months later.

The E. T. Ry. Co. applied to the Board to have the orders of June, 1906, and March, 1907, rescinded and for an order requiring the W. E. Ry. Co. to remove its track from the highway at the point where the applicant proposed to cross it to discontinue its construction at such point or, in the alternative, for an order allowing it to cross the line of the W. E. Ry. Co. on said highway. The applicants claimed to be the senior road and that the W. E. Ry. Co. had never obtained the requisite authority for locating its line. On a case stated to the Supreme Court by the Board.

Held, that the Board had power to refuse to set aside the said orders; that the by-laws passed in July, 1907, were sufficient to legalize the construction of the W. E. Ry. Co.'s line on said highway; and that the Board can now lawfully authorize the latter company to maintain and operate its railway thereon.

Held, further, that leave of the Board is necessary to enable the E. T. Ry. Co. to lay its tracks across the railway of the W. E. Ry. Co. on said highway.

Held, also, that the Board, in exercise of its discretion has power by order to authorize the

maintenance and operation of the W. E. Ry. Co. along said highway and to give leave to the E. T. Co. to cross it and the line of the C.P.R. near the present crossing and to apportion the cost of maintaining such crossing equally between the two companies instead of imposing two-thirds thereof upon the E. T. Ry. Co. as was done by a former order not acted upon; and to order that if the E. T. Ry. Co. finds it necessary in its own interest to have the points of crossing differently placed it should bear the expense of removing the line of the W. E. Ry. Co. to the new point of crossing.

Essex Terminal R.W. Co. v. Windsor, Essex and Lake Shore Rapid R.W. Co., 1.

2. *Jurisdiction of the Board—Electric Railway—Power Line—Protection of the Public and Owners of Other Lines—By-law—1 Edw. VII. ch. 92(O.)—6 Edw. VII. ch. 184(C.)—Railway Act, secs. 235, 237, 238.]—The Windsor, Essex & Lake Shore Rapid Railway Company incorporated by Provincial Statute to construct an electric railway through the Town of Essex built its line on Talbot Street under the authority of a municipal by-law which provided that its poles and wires should not interfere with any then existing poles or wires of any other person or company.*

The railway works were declared to be for the general advantage of Canada.

The company's wires and poles when constructed interfered with existing telegraph, telephone and electric light poles and wires (the latter belonging to one Naylor, erected under an agreement with the town) and created danger by the escape of electrical current therefrom.

Held, that if the railway and power line were constructed before the passing of the Dominion Railway Act no order was necessary to authorize their subsequent maintenance and use, but if not, then leave was required under sections 235 and 237.

Quære, if part only of the work was done before the Act and part afterward.

Assuming that the work was lawfully done before the passing of the Dominion Act the Board has power under section 238 to require the company to execute such works or take such measures as appeared to the Board best adapted to remove or diminish the danger.

An agreement having been made with the approval of the Board for the use by Naylor of the company's poles for carrying his wires, order accordingly, the company being ordered to pay the costs of the proceedings. *Naylor v. Windsor, Essex & Lake Shore Rapid R.W. Co., 14.*

3. *Full Court—Co-ordinate*

Jurisdiction — Order Made by Board — Action in Supreme Court for Non-compliance with such Order — Appeal — Stay of Proceedings.]—In an action by a municipality for an injunction against a railway company to restrain the latter from closing up or interfering with a certain road, it developed that the Board of Railway Commissioners had made an order authorizing the railway company to divert a portion of the said road and construct their line between certain points of such diversion. The trial Judge decided that the municipality could maintain such an action only by the Attorney-General as plaintiff.

Held, on appeal, that, while the Court had jurisdiction to grant all proper relief, the Board of Railway Commissioners having dealt with the matter, the plaintiffs should apply to the Board for relief as they had complete control over their order. *Municipality of Delta v. Vancouver, Victoria & Eastern R.W. and Nav. Co.*, 362.

Dominion Railway — Provincial Railway — Crossing — Connection — Jurisdiction.] — See CONSTITUTIONAL LAW, 1.

Freight Traffic — Undue Delay — Jurisdiction.] — See LORD'S DAY ACT.

Jurisdiction — Agreement — Special Act — Compensation — Arbitration.] — See RUNNING RIGHTS.

Jurisdiction — Construction of Subway under Tracks — Raising Highway — Injunction.] — See SUBWAY.

Jurisdiction — Discretion — Access to Land-locked Property — Location of Crossing — Cost of Construction and Maintenance — Damages to Crossing — Indemnity against.] — See FARM CROSSINGS, 1.

Jurisdiction — Discrimination — Undue Preference.] — See DISCRIMINATION, 1.

Jurisdiction — Flag Station — Annual Earnings — Grain Shipments.] — See FLAG STATION.

Jurisdiction — Telephone Service — Subscriber — Right to Directory — Contract.] — See TELEPHONE, 2.

Jurisdiction — Wires Crossing Railway — Protective Works — Junior and Senior Company — Cost of Construction.] — See TELEPHONE, 1.

BY-LAW.

Electric Railway — Power Line — Protection of the Public — Protection of other Lines — Municipality.] — See BOARD OF RAILWAY COMMISSIONERS, 2.

Municipality — Passenger Fares — School Children — Reduced Rates.] — See STREET RAILWAYS.

Tolls — Approval by Governor-General-in-Council — Reasonable-

ness — Amendment — New Trial.]—See TOLLS, 1.

BRITISH COLUMBIA.

Terms of Union with Canada — Construction of Contract — Discrimination — Freight and Passenger Traffic—Reduced and Higher Tolls.]—See CONSTITUTIONAL LAW, 2.

CANADIAN CAR SERVICE RULES.

Cars — Detention of — Small and Large Dealers—Reasonable Despatch.]—See DEMURRAGE, 1, 2.

CASES FOLLOWED, DISTINGUISHED AND DISCUSSED.

Almonte Knitting Co. v. Canadian Pacific R.W. Co., 3 Can. Ry. Cas. 441, followed, p. 183.

Brant Milling Co. v. Grand Trunk R.W. Co., 4 Can. Ry. Cas. 259, referred to, p. 33.

British Columbia Pacific Coast Cities v. Canadian Pacific R.W. Co., 7 Can. Ry. Cas. 125, followed, p. 346 and see p. 173.

Canadian Manufacturers' Association v. Canadian Freight Association, 7 Can. Ry. Cas. 302, referred to, p. 192.

Desel Boettcher Co. v. Kansas City Southern R.W. Co., 12 I.C. Rep., p. 222, followed, p. 183.

Dominion Concrete Co. v. Canadian Pacific R.W. Co., 6 Can. Ry. Cas. 514, followed, p. 192.

Malvern Urban District v. Malvern, 83 L.T. 326, followed, p. 244.

Midland R.W. Co. v. Gribble (1895), 2 Ch. 827, distinguished, p. 464.

Railroad Company v. Houston, 95 U.S.R. 697, referred to, p. 61.

Robertson v. Grand Trunk R.W. Co., 24 S.C.R. 611, followed, p. 372.

Scobell v. Kingston & Pembroke R.W. Co., 3 Can. Ry. Cas. 412, referred to, p. 339.

Shrewsbury v. Wirrall (1895), 2 Ch. 812, distinguished, p. 244.

St. Mary's Creamery Co. v. Grand Trunk R.W. Co., 8 O.L.R., distinguished, p. 372.

CARRIERS OF GOODS.

1. *Common Carrier—Liability for Damage to Goods in Transit —Contract Limiting Liability.*]—*Held*, that in action against a carrier for damage to goods in transit, it must be proved that the goods were undamaged when delivered to the carrier.

2. That when goods are shipped by rail under a contract limiting liability and providing for transport at owner's risk,

the railway company is not liable for damage to such goods unless it be proved that such damage is the result of negligence on the part of the company. *Mason & Risch Piano Co. v. Canadian Pacific R.W. Co.*, 369.

2. *Special Contract Limiting Liability — Negligence — Notice of Loss—Omission to Give—Railway Act, R.S.C. 1906, ch. 37, secs. 284(7), 340.]* — By sec. 284(7) of the Railway Act, R.S.C. 1906, ch. 37: "Every person aggrieved by any neglect or refusal of the company to comply with the requirements of this section shall, subject to this Act, have an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or its servants." By sec. 340: "No contract, condition, by-law, regulation, declaration or notice made or given by the company, impairing, restricting or limiting its liability in respect of the carriage of any traffic, shall, except as hereinafter provided, relieve the company from such liability, unless such class of contract, condition, by-law, regulation, declaration or notice shall have been first authorized or approved by order or regulation of the Board. (2) The Board may, in any case, or by regulation, determine the ex-

tent to which the liability of the company may be so impaired."

The defendants received from the plaintiff a mare, with other animals, to be carried from a station on their line of railway in Ontario to a point in British Columbia, under a special contract, which had been approved of by the Railway Board, (which the plaintiff signed). Under this contract the animals were carried at a lower rate than the company were entitled to charge. The contract contained a provision that the defendants should in no case be responsible for any amount exceeding \$100.00 for the loss of any one horse, or a proportionate sum in any one case for injuries to same, and that any loss or damage should be computed and paid for on such basis. There was a further provision relieving the company from liability, "unless a written notice, with the full particulars of the loss or damage and of the claim to be made in respect thereof, is delivered to the station agent at the said point of delivery within 24 hours after the said property, or some part of it, has been delivered."

During the carriage on the railway, the mare was, through the defendants' negligence, seriously injured. Before the consignment arrived at its destination the plaintiff, finding that the mare was permanently injured, by the permission of the

railway superintendent there, removed the mare from the car at an intermediate station and sold her at a loss, the remainder of the shipment being carried on to the place of delivery. No notice of the loss was given there to the company's official within the 24 hours:—

Held, that notwithstanding the loss was sustained through the defendants' negligence, the special contract was binding on the plaintiff, so that in no event could he recover more than the proportionate part of \$100; but that the omission to give the required notice relieved the company from all liability.

Robertson v. Grand Trunk R.W. Co. (1895), 24 S.C.R. 611, followed; *St. Mary's Creamery Co. v. Grand Trunk R.W. Co.* (1904), 8 O.L.R. 1, 3 Can. Ry. Cas. 447, distinguished.

Judgment of the county court of the county of Grey, affirmed. *Mercer v. Canadian Pacific R.W. Co.*, 372.

3. *Live Stock Contract — Restriction of Liability—Contract Made in the United States for Transit of Stock to Canada — Provisions of Contract Similar to Those Approved by Railway Board—Validity of Contract — Railway Act, R.S.C. 1906, ch. 37, secs. 284(7), 340.*—The plaintiff delivered to a railway company at Brockton, Mass., U.S., a number of valuable horses for carriage to Grimsby, Ontario,

under a contract known as a live stock contract, by which the horses were to be carried on the line of that railway as far as it went and then by connecting lines to the place of delivery, the contract being expressly entered into by the contracting railway on its own behalf, as well as on behalf of the connecting lines. The contract contained a provision that on payment of a specified rate of freight, being a rate lower than that which the company was entitled to charge, liability was to be limited to an amount not exceeding \$100 for each animal, or a total liability not exceeding \$1,200, the plaintiff having the option of shipping at a higher rate and obtaining the company's liability as common carriers. The provision restricting liability was similar to that contained in the form of live stock contract of the defendants approved by the Railway Board under sec. 340 of the Railway Act, R.S.C. 1906, ch. 37. The horses were carried by the contracting railway as far as its line extended, and were then delivered to a connecting railway and thence to the defendants, and during the transit on the defendants' line an accident occurred through the negligence of the defendants, in which some of the animals were killed and others injured:—

Held, that by the terms of the contract it applied not only

to the railway company with which it was made, but with the connecting railways, and that by its terms the defendants were exempted from liability beyond the amount stipulated for; and that, even if the approval of the Railway Board was essential to its validity, such approval had been obtained, for it was, in substance, the same class of contract which had been approved. *Sutherland v. Grand Trunk R.W. Co.*, 389.

4. *Common Carriers — Liability for Damage to Goods Carried — Stipulation Exempting from Liability Strictly Construed — Description "Brittle and Fragile Objects" not to Apply to Wooden Cheese Boxes—Liability of Carrier for Fault in Cases Under Exemption Clause —Proof of Fault by Excessive Percentage of Goods Damaged.] —Held*, common carriers, as the insurers of the goods entrusted to them, are liable for loss of, and damage to them. Stipulations in contracts for the carriage of goods and in bills of lading, exempting the carrier in from liability in certain cases, are construed strictly. Wooden cheese boxes do not come under the description, in such a stipulation, of "*brittle and fragile objects*," especially when it appears at the end of a long enumeration of objects wholly dissimilar. Supposing, however, the clause to apply, the carrier would still be

liable for damage proved to be caused by his fault, and such fault is established, as to one shipment of cheese in wooden boxes, by shewing that 11% of the boxes were damaged, with the additional proof that the average number damaged, in ordinary shipments in the cheese trade, is only 5%. *Alexander v. Canadian Pacific R.W. Co.*, 406.

Tolls—By-law Fixing Rates—Non-approval —Reasonableness —New Trial—Amendment.] — See TOLLS, 1.

Quick Release of Cars—Small and Large Dealers—Canadian Car Service Rules—Reasonable Despatch — Public Interest.] — See DEMURRAGE, 1.

CARRIERS OF PASSENGERS.

Passenger—Right to and Removal from Particular Seat — Authority of Conductor — Smoking Car — Seat Already Taken and Temporarily Vacated by Another—Assault—Rights of Passenger—Damages—Costs.] — The plaintiff, Brazeau, entered a smoking car of the defendant company and took a vacant seat although told by the persons sitting near that it was taken and vacated temporarily.

Upon his refusing to vacate the seat after having been, by the conductor, twice required to do so, the conductor removed him forcibly without using un-

necessary force and placed him in the passageway pointing him to vacant seats.

Held, 1. That the plaintiff could not recover damages for an assault or removal from the seat; the conductor having full authority to determine what seat a passenger is to occupy.

2. That railway companies are not bound to furnish smoking cars or any particular description of car beyond what the passengers' ticket calls for. *Brazeau v. Canadian Pacific R.W. Co.*, 477.

Commutation Tickets—Undue Preference.]—See DISCRIMINATION, 2.

Fares—School Children—Reduced Rates—By-law of Municipality.]—See STREET RAILWAYS.

CARS.

Detention of — Small and Large Dealers—Contract of Carriage—Canadian Car Service Rules — Reasonable Despatch.]—See DEMURRAGE, 1, 2.

CATTLE AT LARGE.

Liability to Fence—Lands not Enclosed—Railway Act, secs. 254, 294—Railway Act, 1888, sec. 194—53 Vict. ch. 28, sec. 2, sub-sec. 3.]—Section 254(4) of the Railway Act is not retro-

active. The exemption from the obligation to erect fences in localities described in this subsection, does not relieve a railway company from liability for animals killed on the railway where fences were erected before the passing of the Act, and were thereafter maintained.

The track of a railway company passing through a locality in which the lands on either side were not enclosed and either settled or improved (sec. 254(4) Railway Act) was fenced on both sides where adjacent to a public highway.

The plaintiff's cow was turned out of its stable to pasture on unenclosed land and wandered along the public highway (which highway ran parallel to the railway) until it got upon the property of the defendants through their defective fence, where it was killed.

Held, (1) That the defendants had not established upon the evidence that such animal had got at large through the negligence or wilful act or omission of the plaintiff.

(2) That the defendants having erected the fence although not bound by law to do so and maintained it before and since the passing of the Act, are not exempted from liability to the plaintiff under section 254(4) of the Railway Act. *Quinn v. Canadian Pacific R.W. Co.*, 143.

Escape to Highway from Enclosure—Open Gate — Station Grounds—Insufficient Height of Fences — Negligence — Contributory Negligence.] — See FENCES AND GATES.

CHILDREN.

Access to Machinery—Liability for.]—See NEGLIGENCE, 6, 7.

COMMON CARRIERS.

See CARRIERS OF GOODS, 1, 2, 3, 4.

COMMUTATION TICKETS.

Passengers — Undue Preference.]—See DISCRIMINATION, 2.

COMPENSATION.

Agreement — Validation by Special Act — Arbitration — Jurisdiction of Board.] — See RUNNING RIGHTS.

Arbitration and Award—Payment into Court—Costs.]—See EXPROPRIATION, 5.

Damages to Land Remaining—Setting Aside Award.]— See EXPROPRIATION, 1.

Highway—Diversion of—Access to Navigable Waters — Rights of Landowners — Foot Crossing.]—See EXPROPRIATION, 6.

Interest on — Appeal from Award.]—See EXPROPRIATION, 3.

Offer by Railway—Acceptance of.]—See EXPROPRIATION, 2.

CONDUCTOR.

Authority of—Right to Allot Seats—Removal from—Smoking Car — Assault — Damages — Costs.]—See CARRIERS OF PASSENGERS.

CONSTITUTIONAL LAW.

1. *Jurisdiction of the Board—Dominion Railway—Provincially Incorporated Railway—Line of Dominion Railway—Crossing — Connection—Sections 3, 8, Railway Act, 1906—3 Edw. VII. ch. 84(D.) — 4 Edw. VII. ch. 47 (D.).]*—The Board has no jurisdiction to order a connection to be made or traffic to be interchanged between a Dominion railway and a provincially incorporated railway which it crosses; such provincial railway not having been declared a work for the general advantage of Canada.

Under sec. 8 of the Railway Act the jurisdiction of the Board is confined to the point of crossing, and does not extend to the whole line of the provincial railway.

Where a railway company incorporated by the Parliament of Canada was authorized to acquire two provincially incorpor-

ated railways but no work had been done in connection with such railway, and the validating Act provided that the acquisition should not make such railways subject to the Railway Act, 1903, or works for the general advantage of Canada, but that they should remain subject to the legislative control of the province.

Held, 1. That under sec. 3, the special Provincial Act overrides the Railway Act.

2. That there is no jurisdiction to authorize making connections with or affording facilities to a Dominion railway which does not exist, and an order requiring such connection to be made would be in effect ordering a provincial railway to connect with a Dominion railway, as to which the Board has no jurisdiction. *Boards of Trade of Galt, Preston, Hespeler, Waterloo, Berlin v. Grand Trunk, Canadian Pacific, Berlin, Waterloo, Wellesley & Lake Huron, Preston & Berlin, Galt, Preston & Hespeler Ry. Cos.*, 195.

2. *Contract—Construction—British Columbia—Dominion of Canada—Undue or Unjust Discrimination—Freight and Passenger Traffic—Reduced and Higher Tolls—Terms of Union—44 Vict. ch. 1, par. 22(D.)—Railway Act, 1879, sec. 17, sub-secs. 6, 11—Railway Act, 1906, sec. 315.*—The Attorney-

General for British Columbia applied to the Board for an order directing the Canadian Pacific Railway Company on the ground of undue or unjust discrimination to reduce the tolls on freight and passenger traffic over the main line of railway in the Province and thus place it upon the same favourable conditions in respect to such tolls as are other portions of Canada.

The applicant contended that under the terms of union (see schedule to Imperial Order in Council Rev. Stat. British Columbia, pp. 105 *et seq.*, May 16th, 1871), whereby British Columbia entered Confederation, there was an implied contract that the railway company should charge no higher tolls in one section of territory than another through which the railway ran.

Held, 1. That the application must fail, the Board being unable to find any such contract expressed or implied, and there being no evidence of unreasonable rates or unjust discrimination.

2. That sec. 17, sub-secs. 6 and 11 of the Railway Act of 1879, and sec. 315 of the Railway Act, allow different tolls to be charged in different localities where different circumstances exist justifying such treatment.

3. That the terms of the contract with the Dominion Government for the construction of the Canadian Pacific Railway, dated

21st October, 1880, schedule to 44 Vict. ch. 1, have nothing to do with freight and passenger tolls in British Columbia; the only party who could make any complaint as to their non-observance being the Government of Canada. *British Columbia Pacific Coast Cities v. Canadian Pacific Ry. Co.* (Vancouver Interior Rates Case, No. 104), 7 Can. Ry. Cas. 125, followed. *Attorney-General for British Columbia v. Canadian Pacific Ry. Co.*, 346.

CONSTRUCTION OF RAILWAY.

Highway — Diversion — Compensation — Landowner's Interest — Access to Navigable Waters — Conditions — Foot Crossings.] — See EXPROPRIATION, 6.

CONTRACT.

Agreement — Construction of — Freedom from Liability for Damage a Consideration — "Property," Meaning of — General Words — Ejusdem Generis.] — In consideration of the construction of a siding to their mill premises, plaintiff company entered into an agreement with the railway company freeing them from liability for damage to the "siding or to buildings, fences or other property whatsoever" of the plaintiff company,

"or of any other person." Two horses of the plaintiff company, engaged in hauling a car from one part of the siding to another, were killed by being run down with a car sent on the siding by a flying switch:—

Held, reversing the finding of Wilson, Co.J., that the word "property" in the agreement was not confined to fixtures, buildings and rolling stock, and that the horses were properly included. *East Kootenay Lumber Co. v. Canadian Pacific Ry. Co.*, 310.

Construction of — Negligence — Proof of.] — See CARRIERS OF GOODS, 4.

Construction of — Unjust Discrimination — Freight and Passenger Traffic.] — See CONSTITUTIONAL LAW, 2.

Freight Rates — Short and Long Poles — Discrimination — Higher and Export Rates.] — See TARIFFS, 3.

Made in United States — Carriers of Goods — Validity — Approval of Board.] — See CARRIERS OF GOODS, 3.

Telephone Service — Subscriber — Right to Directory — Jurisdiction of Board.] — See TELEPHONE, 2.

Undercrossing — Farm Operations — Jurisdiction of Board.] — See FARM CROSSING, 2.

**CONTRACT LIMITING
LIABILITY.**

Goods in Transit—Common Carriers.]— See CARRIERS OF GOODS, 1.

Live Stock — Approval of Board.] — See CARRIERS OF GOODS, 2, 3.

CONTRIBUTORY NEGLIGENCE.

Animals Killed on Track — Escape to Highway from Enclosure — Open Gate to Station Grounds—Insufficient Height of Fences — Negligence.] — See FENCES AND GATES.

Disobedience to Rules—Negligence of Fellow Servants.] — See MASTER AND SERVANT.

Rules of Company—Judge's Charge — Misdirection — New Trial.]—See NEGLIGENCE, 4, 5.

Street Railway — Driver of Vehicle—Crossing — Approaching Car.]—See NEGLIGENCE, 11.

Street Railway — Injury to Person Crossing in Front of Car — Usual Stopping Place—Omission to Stop—Nonsuit.]— See NEGLIGENCE, 2, 3.

COSTS.

Assault—Damages— Removal of Passenger from Seat — Authority of Conductor.]—See CARRIERS OF PASSENGERS.

Damages for Taking Land—

Arbitration — Award — Payment into Court.]—See EXPROPRIATION, 5.

Taxation — Arbitrator's Fees — Counsel Fees—Expert Witness.]—See EXPROPRIATION, 4.

Arbitration — Taxation of Counsel Fees.]—See EXPROPRIATION, 4.

CRIMINAL LAW.

Order of the Railway Committee for Protection of Street Crossing Against Two Railways — Charge of Failure to Comply Therewith — Joint Indictment Against Both Railways—Validity of.]—The Railway Committee of the Privy Council of Canada, upon the application of a city, in order to provide protection at a place where a street was crossed by the tracks of two railways, ordered and directed that the two railways should, within a specified time, properly plank between their said tracks, and also provide gates and watchmen thereat, and should thereafter maintain and protect the said crossing:—

Held, that a joint indictment against the two companies for the failure to place gates and a watchman at the crossing, would not lie; and therefore there was no jurisdiction in the court of general sessions of the peace to try such an indictment, and a conviction made at the sessions

against the two companies was quashed.

The effect of secs. 165, 221 and 247 of the Criminal Code, secs. 33, 427 and 431 of the Railway Act, considered. *Rex v. Grand Trunk & Canadian Pacific R.W. Cos.*, 453.

DAMAGES.

Arbitration and Award — Payment into Court—Costs.]— See EXPROPRIATION, 5.

Assault—Removal of Passenger from Seat — Authority of Conductor—Costs.]— See CARRIERS OF PASSENGERS.

Excessive Assessment of — Withdrawal of Case from Jury — Wrongful Admission of Evidence.]—See NEGLIGENCE, 9, 10.

Lands Taken for Railway Purposes—Damage to Land Remaining—Compensation.]—See EXPROPRIATION, 1.

DEDICATION.

Defective Crossing not on Highway — Unauthorized by Board—Duty to Fence.]— See HIGHWAY CROSSING.

DEMURRAGE.

1. *Quick Release of Cars — Small and Large Dealers—Contract of Carriage—Canadian Car Service Rules—Reasonable Des-*

patch—Credit for Free Time — Public Interest.]—The Wallaceburg Sugar Company applied to the Board for an order directing the railway companies to establish what is generally known as an Average Demurrage Plan.

Under the Canadian Car Service Rules (framed for the quick release of cars rather than the collection of demurrage) of the Canadian Car Service Bureau, to whose rules Canadian and foreign railway companies operating in Canada conform, 48 hours free time are allowed to dealers for the unloading of cars, for an additional time \$1.00 per car per day is charged unless on account of the number of cars tendered to the dealer being unreasonable or the inclemency of the weather preventing unloading with reasonable despatch, an extension of free time is justified and allowed.

By the establishment of the Average Demurrage Plan the dealer would get credit on future shipments of the free time he had saved under the 48 hours previously and could hold such shipments in cars without any demurrage charge until the time credited to him had expired.

Held, 1. That in the public interest the application should be dismissed; 48 hours under ordinary circumstances being sufficient time for unloading cars.

2. That the contract of car-

riage is, that the car containing the goods after reaching the point of destination shall be released and unloaded with all reasonable despatch, not to exceed 48 hours in the case under consideration.

3. The penalty of \$1.00 per day for extra time makes the dealer prompt in releasing cars and thus increases the supply of them for the shipping public, while the Average Demurrage Plan might make a dealer dilatory in unloading so long as he had free time to his credit.

4. Each car, under the Car Service Rules being dealt with by itself, insures equal treatment between the smaller and larger dealer, but if the Average Demurrage Plan were in force it would give preference and advantage to the dealer with a large number of cars to unload and with a large capacity for storage. *Wallaceburg Sugar Co. v. Canadian Car Service Bureau*, 332.

2. *Free Time — Extension — Unreasonableness of Two-day Limit — Weather Conditions — Onus of Proof.*]—The applicants applied to the Board to extend the free time for unloading charcoal from two to three days.

Held, 1. That the applicants have failed to shew that the time limit of two days is not sufficient under ordinary circumstances and the onus of establishing the

unreasonableness of the two-day limit is upon them.

2. Railway companies now allow additional free time when the weather conditions are unfavourable for unloading expeditiously.

3. The application must fail, the time limit of two days being sufficient. *McDiarmid & Gall v. Grand Trunk and Canadian Pacific Ry. Cos.*, 337.

DIRECTORY.

Telephone Service — Subscriber—Right to—Contract.]—*See TELEPHONE*, 2.

DISCRIMINATION.

1. *Agreement—Reduced Rates — Adequate Consideration — Unjust Discrimination—Similar Circumstances and Conditions—Undue or Unreasonable Preference or Advantage—Jurisdiction of the Board—Railway Act; secs. 315 and 317.*]—By an agreement made in 1897 between the applicant coal company and the respondent railway company, the latter agreed for valuable consideration amongst other things to charge the former at the rate of not more than six tenths of its ordinary tariff rates on all "plant" shipped by the coal company over the lines of the railway company. The railway company ceased to comply with the provision of the agreement as

to rates on 1st May, 1907, on the ground of illegality.

The coal company applied for an order to compel the railway company to file a tariff of such reduced rates and for a refund of all excesses charged to the applicant.

Held, 1. That it was impossible to find that the consideration paid to the railway company was "adequate" for the favoured treatment.

2. That other persons and corporations under similar circumstances and conditions in the same district would be unjustly discriminated against by a continuance of the reduced rates and that the agreement in that respect constituted an undue or unreasonable preference or advantage contrary to secs. 315 and 317 of the Railway Act.

Assuming that the Board had jurisdiction to make the order asked as to which there is grave doubt, the application must be refused. Reference to *Brant Milling Co. v. Grand Trunk Ry. Co.*, 4 Can. Ry. Cas. 259. *Crow's Nest Pass Coal Co. v. Canadian Pacific Ry. Co.*, 33.

2. *Commutation Passenger Tickets—Unjust Discrimination—Undue Preference—Railway Act, secs. 77, 341.*—Upon an application to the Board for an order directing the Grand Trunk Ry. Co. to issue commutation tickets as well between Toronto and Brampton as between the

same point and Oakville, Brampton being within 4/100 of a mile of the distance from Toronto to Oakville, but on a different line; it was contended that the passenger fares between the said points constituted an unjust discrimination or undue preference in favour of Oakville and against Brampton, and that the onus lay on the railway company by sec. 77 to shew that it did not exist.

Held, 1. That under sec. 341 the railway company was within its rights in issuing such reduced fare tickets between Toronto and Oakville.

2. That the application must be refused, Oakville not having profited at the expense of Brampton.

3. A railway company has the right under the Railway Act to discriminate between points and is only required to prove itself free from unjust discrimination or undue preference. *Wegenast v. Grand Trunk Ry. Co.*, 42, 168.

3. *Westbound Rates—Unjust Discrimination Between Localities—New Tariffs—Higher Rates—Restoration of Former Tariffs—Evidence.*—The Winnipeg Jobbers' Association applied to the Board for an order directing the railway company to restore the former Winnipeg Westbound rates to the Kootenay district.

After the judgment in the *British Columbia Pacific Coast Cities v. Canadian Pacific Ry.*

Co. (Vancouver Interior Rates Case), 7 Can. Ry. Cas. 125, the company removed the discrimination there found to exist between localities by raising the Winnipeg Westbound rates.

Held, that the application must fail, there being no evidence that these rates were excessive. *Winnipeg Jobbers' Association v. Canadian Pacific Ry. Co.*, 173.

4. *Traders' Tariffs — Distributing Centre — Balances — Through Rates—Local Rates—Unjust Discrimination and Undue Preference in Favour of Particular Persons and Between Different Localities — Higher Tolls for Shorter than Longer Distances—Shorter Included in Longer — Substantially Similar Circumstances and Conditions—New Tariffs—Higher Rates — Restoration of Former Tariffs—Evidence.*]—The Winnipeg Jobbers' Association applied to the Board for an order directing the Canadian Pacific Ry. Co. to restore the Traders' Tariffs previously existing in Western Canada, from Winnipeg, as a distributing centre, (giving the Winnipeg traders the benefit of the balance of the through rate on re-shipments) instead of the new tariffs recently put in force by the railway company.

Upon a complaint by the Portage la Prairie Board of Trade, the Board had held that this system of traders' tariffs was

illegal as being an unjust discrimination and undue preference in favour of particular persons and between different localities, and the charging of higher tolls for a shorter than for a longer distance where the shorter distance is included in the longer.

The railway company complying with the view taken by the Board had substituted the tariffs complained of by the applicants.

Held, that the application must fail, there being no evidence upon which the Board can reduce the rates charged in the existing tariffs to the same sums that were paid by the favoured few under the old traders' tariffs.

The question of whether it would be possible to standardize the Ontario Town Tariffs, making them applicable to the Western Provinces, and whether the railway companies can or should be compelled to grant commodity rates out of Winnipeg were reserved. *Winnipeg Jobbers' Association v. Canadian Pacific, Canadian Northern and Grand Trunk Pacific Ry. Cos.*, 175.

5. *Group Rates — Common Points—Main and Branch Line Traffic—Similar Circumstances—Unjust Discrimination—Railway Act, sec. 315.*]—On a complaint that higher rates were charged from a point on a branch line for a shorter distance than from points on the

main line to the same point thereby constituting unjust discrimination between different localities within the provisions of section 315 of the Railway Act.

Held, that traffic originating on a branch line is not carried to a certain point under similar conditions to traffic originating on the main line carried to the same point until the junction of the branch line with the main line is reached. *Almonte Knitting Co. v. Canadian Pacific and Michigan Central Ry. Cos.*, 3 Can. Ry. Cas. 441, followed.

The rates complained of were equal for a group of common points on the main line.

Held, that although group rates of necessity result in a certain amount of discrimination, so long as such discrimination is not undue it is not unreasonable. *Desel Boettcher Co. v. Kansas City Southern Ry. Co.*, 12 I.C. Rep., p. 222.

Held, also, that the difference in the rates complained of did not constitute undue discrimination within the different sections.

Mr. Commissioner Mills dissented, holding that unjust discrimination had been shewn. *Malkin & Sons v. Grand Trunk Ry. Co.*, 183.

6. *Interswitching — Charges Paid Under Protest—Recovery.* —Charges for interswitching collected prior to 1st September.

1908, although paid under protest, cannot be recovered back. *Canadian Manufacturers' Association v. Canadian Freight Association*, 7 Can. Ry. Cas. 302, referred to.

Dominion Concrete Co. v. Canadian Pacific Ry. Co., 6 Can. Ry. Cas. 514, followed. *Laidlaw Lumber Co. v. Grand Trunk Ry. Co.*, 192.

Contract Between Province and Dominion—Freight and Passenger Traffic—Tolls—Terms of Union. —See CONSTITUTIONAL LAW, 2.

Short and Long Poles—Lumber—Local and Joint Tariffs—Higher and Export Rates. — See TARIFFS, 3.

EASEMENT.

Severance of Ownership — Legislation—Use of Crossing for Public Purposes. — See FARM CROSSING, 3.

ELECTRIC RAILWAY.

Compensation to Infant — Carelessness of Motorman — Proper Precautions—Evidence. — See NEGLIGENCE, 8.

Power Line—Protection of the Public and other Lines — Jurisdiction of the Board — By-law. — See BOARD OF RAILWAY COMMISSIONERS, 2.

Telephone Wires Crossing —

Protective Appliances—Junior and Senior Company—Cost of—Jurisdiction of Board.]—See TELEPHONE, 1.

EVIDENCE.

Discrimination Between Localities—New Tariffs—Higher Rates—Restoration of Former Tariffs.]—See DISCRIMINATION, 3, 4.

Electric Railway—Injury to Infant—Carelessness of Motor-man — Proper Precaution.] — See NEGLIGENCE, 8.

Improper Admission of—Excessive Damages.]—See NEGLIGENCE, 9, 10.

Negligence—Level Crossing—New Trial.]—See NEGLIGENCE, 1.

Rules—Disobedience to—Collision — Negligence—Contributory Negligence — Fellow Servants.]—See MASTER AND SERVANT.

EXECUTORS.

Action by—Form of—Pleading—Amendment at Trial. — See NEGLIGENCE, 9, 10.

EXPROPRIATION.

1. *Arbitration — Award Set Aside—Land Taken for Railway Purposes—Compensation—Damage to Remaining Land—Rail-*

way Act, sec. 155.]—A railway company under its compulsory powers of expropriation acquired from the owner a certain portion of his land for the purposes of their undertaking. A majority of arbitrators by their award allowed compensation for depreciation to the remainder of his land resulting from the operation of the railway elsewhere than on the land so taken.

Held, upon appeal,

1. That the award must be set aside and the question referred back to the arbitrators for further consideration and award.

2. That the plaintiff is entitled to compensation for the depreciation of the value of his other lands, in so far as such depreciation is due to the anticipated legal use of works to be constructed upon the lands which have been taken from him under the Railway Act.

3. That the arbitrators may take into consideration the fact that the lands sought adjoin the railway premises and are convenient for extension of their yard. *Canadian Pacific R.W. Co. v. Gordon, 53.*

2. *Acceptance of Amount Offered by Company — Railway Act, 1903, sec. 159.]—Under section 159 of the Railway Act, 1903, if the owner of land sought to be expropriated by the railway company does not accept*

the offer of the railway company within ten days, the company may at once proceed to have the amount of the compensation payable determined by arbitration; but the owner may accept the offer at any time after the expiration of ten days if in the meantime the company has taken no further proceedings, and such offer and acceptance will constitute a binding contract between the parties upon which the owner may proceed in an action to recover the amount offered. *Bennetto v. Canadian Pacific R.W. Co.*, 223.

3. *Compulsory Taking of Land—Railway Act, R.S.C. 1906, ch. 37, secs. 192-214—Appeal from Award of Arbitrators—Interest on Amount Awarded.*]—1. Upon an appeal, under sec. 209 of the Railway Act, R.S.C. 1906, ch. 37, from an award of arbitrators determining the compensation to be paid to an owner for the compulsory taking of his lands by a railway company, the Court will not assume the function of the arbitrators and make an independent award, but will rather treat the matter as it would an appeal from the decision or verdict of a Judge, and the award will not be disturbed, unless the arbitrators manifestly erred in some principle in arriving at their conclusion.

2. Interest on the amount awarded should not be added by

the arbitrators, especially in a case where the claimant remains in possession of the property until after the date of the award.

3. It is proper that the claimant should be allowed the actual value of the property to him, and not merely the market value as on a sale.

4. The arbitrators are not bound to allow ten per cent. extra on the amount of the compensation for the compulsory taking, although that is frequently done, and the Court will not interfere with their refusal to allow such percentage. *Canadian Northern R.W. Co. v. Robinson*, 226.

4. *Costs—Arbitration Under Railway Act—Taxation of Costs—Railway Act, R.S.C. 1906, ch. 37, sec. 2, sub-sec. (5), sec. 199—Arbitrator's Fees—Counsel Fees—Fees of Expert Witnesses.*]—1. Under sub-sec. (5) of sec. 2 of the Railway Act, R.S.C. 1906, ch. 37, interpreting the word "costs" used in sec. 199 of the Act, as including fees, counsel fees and expenses, the costs of an owner who succeeds in an arbitration under the Railway Act should be taxed as between solicitor and client.

Malvern Urban District v. Malvern (1900), 83 L.T. 326, followed.

2. The tariff of costs prescribed for ordinary litigation

may be accepted as a general guide for taxing the costs of such an arbitration; but when, in the opinion of the taxing officer, the fees fixed by that tariff are inadequate compensation for the services necessarily and reasonably rendered, he is not bound by it and should not follow it.

3. For the purposes of the taxation of such costs the arbitration began when the company served notice upon the owner offering an amount which they were willing to pay and naming its arbitrator, and items for work done even before that date should be allowed if they were for work that would properly be costs of the arbitration if done after that date; for example, Fee perusing the order of the Railway Commissioners giving leave to expropriate, and taking instructions.

4. The owner was entitled to tax the fees paid to the arbitrators on taking up the award.

Shrewsbury v. Wirral, [1895] 2 Ch. 812, distinguished.

5. Counsel fees allowed by the taxing officer were reduced to \$100 per day for first counsel and \$75 per day for second counsel.

6. The fees actually paid to expert witnesses should not necessarily be allowed, but only fair and reasonable fees for the time occupied in attending before the arbitrators and in quali-

fying themselves to give evidence.

7. The costs of the taxation, including a fee of \$25 for the argument before the Judge, should be borne by the company. *Canadian Northern R.W. Co. v. Robinson*, 244.

5. *Land Damages—Arbitration and Award — Payment into Court—Costs.*]—In an action brought by plaintiff claiming damages for lands taken for railway purposes, part of plaintiff's claim had been the subject of arbitration and award, but it appeared that part of the work of construction preceded the filing of the expropriation plans.

Held, that plaintiff was entitled to recover for all damages which could have been legitimately excluded from the consideration of the arbitrators, and that plaintiff's claim could not be deemed to have been satisfied by an award for injuries which would not have formed a legitimate subject for the consideration of the arbitrators.

Defendant paid into Court a sum of money which the trial Judge held insufficient, but which the Court, under the evidence, thought excessive, if not the extreme limit of any damage of which there was reasonable evidence.

Held, in respect to this portion of the judgment appealed from, that defendant's appeal

must be allowed with costs. *Beaton v. Mabou & Gulf R.W. Co.*, 251.

6. *Construction of Railway—Diversion of Highway—Railway Act, sec. 178—Compensation—Landowners Interested—Access to Navigable River—Conditions—Foot Crossings.*]—A railway company applied to the Board under section 178 of the Railway Act for authority to expropriate certain lands for the purpose of the diversion of a public highway.

The landowners interested opposed the application unless the following conditions were granted: (1) that the adjoining landowners be paid compensation for the lands (part of the public highway) on which the railway was to be built on the ground that the said lands would revert to them as a closed public highway, (2) that the company pay compensation to the owners of the land required for the diverted highway, (3) that the owners be given the right of crossing on foot and to maintain landings and net-houses on the company's right of way next the river opposite the lands of each owner.

Held, that the application should be granted, subject to the condition as to foot crossings. *Vancouver, Victoria & Eastern Ry. & Nav. Co. v. Municipality of Delta*, 354.

FARM CROSSING.

1. *Jurisdiction and Discretion of the Board—Land-locked Lands—Way of Access to Brick Yard—Location of Crossing—Convenience—Land on one side of the Railway—Cost of Construction and Maintenance—Indemnity Against Damages by Accidents at Crossing—Railway Act, secs. 252, 253.*]—Henry New (a brick manufacturer) applied to the Board under secs. 252 and 253 of the Railway Act for an order directing the Toronto, Hamilton and Buffalo Ry. Co. to provide and construct a suitable crossing where the railway abuts on the lands of the applicant.

By reason of the construction of the Toronto, Hamilton and Buffalo Ry. New was deprived of access to a travelled road except by passing over the lands of his sons and crossing a number of railway tracks.

The object of the application was to obtain access to the said road by a crossing over the railway for the purpose of more conveniently carrying on his manufacturing business, but not in any way for farm purposes or as a farm crossing.

Held, that the application for a crossing of the nature of a farm crossing should be granted by the Board in the exercise of its discretion, upon the condition that all expenses of construction and maintenance of

the crossing must be borne by the applicant. *New v. Toronto, Hamilton & Buffalo Ry. Co.*, 50.

2. *Contract — Undercrossing — Suitable Farm Crossing — Farm Operations*—Sections 252, 253 *Railway Act*.]—An application was made to the Board under sections 252 and 253 of the *Railway Act* for an order directing the *Canadian Pacific Ry. Co.* to provide and construct a suitable farm crossing.

The applicant complained that the present undercrossing was too small to carry on properly his farming operations, and applied to have it enlarged.

Held, that the application must be refused, the railway company having carried out their contract in regard to the undercrossing.]—*Stiles v. Canadian Pacific Ry. Co.*, 190.

3. *Dominion Railway Act*, 1888, sec. 191—*Construction—Heading and Side-note—Use of Crossing for Business of Brick-yard—Agreement to Provide and Maintain Crossing—Reservation — Easement — Interference with Operation of Railway — Severance of Ownership — Cesser of Right*.]—Section 191 of the *Dominion Railway Act* of 1888 is not restricted in its application to crossings for farm purposes merely, notwithstanding the heading and side-note “*Farm Crossings*,” which may be taken as descriptive of the

character of the construction of the crossing, and not restrictive of the purposes for which it may be used or of the uses to which the lands crossed by the railway may be put, and notwithstanding the words of the section itself, “convenient and proper for the crossing of the railway by farmers’ implements, carts and other vehicles,” which may be similarly interpreted.

The defendants, as lessees of S., occupied and operated a brick-yard, in a city, on the north side of the plaintiffs’ railway, and in connection with their business used a private lane over the property of M., lying to the south of the railway. This lane led to a street, and was the only means of access from the brick-yard to a public highway. To reach this lane the defendants used a crossing over the railway, and their right to do so was called in question by this action. When the railway was built, the land leased by the defendants and that owned by M. were the property of Messrs. B., who in December, 1894, conveyed to the plaintiffs a right of way through their property, and obtained simultaneously with their conveyance an agreement by which the plaintiffs covenanted to provide and maintain “a farm crossing” at the point now in question, which was duly constructed. The Messrs. B. conveyed both proper-

ties to M. in 1901, and in 1903 F. acquired from M. the premises afterwards leased by the defendants. In his conveyance M. granted to F. a right of way over the lane opposite the crossing. S. acquired title from F. and subsequently leased to the defendants. The land leased by the defendants had been in use as a brick-yard for 25 years before 1893, but lay idle from that year until 1903, when S. established a brick-making industry upon it. The plaintiffs were aware that S. bought with the intention of using the crossing and the lane to the south as the means of conveying from his yard brick for local trade, and with this knowledge they reconstructed and kept in repair the crossing in question, which was used by S. and the defendants for that purpose, without objection by the plaintiffs, until 1906, when they complained of its use, and began this action in July, 1907:—

Held, that a railway company acquiring a right of way may take the land required subject to reservations in favour of the grantor of such rights of crossing or other easements as may be agreed upon, and are not inconsistent with the use of the right of way for railway purposes; an agreement for a crossing contemporaneous with the deed of the right of way is equivalent to a reservation in the deed it-

self; and, the vendors having made such an agreement, the character and extent of the right of crossing must be determined by the terms of that agreement. Subject to the question of severance, the covenant of the plaintiffs with the "vendors, their heirs, executors and administrators," enured to the benefit of the assigns as grantees of the vendors, including lessees of such grantees; and the use which the defendants were making of this crossing was within the rights conferred upon the Messrs. B. by the agreement of the plaintiffs, not being, upon the evidence, inconsistent with the safe operation of the railway, nor unduly increasing the burden of the easement created by the agreement.

Held, also, that, although when the right of crossing was created the lands on either side of the railway belonged to the same owners, and were now held by different owners, there was no such severance as would involve the cesser of the right of crossing. *Midland R.W. Co. v. Gribble*, [1895] 2 Ch. 827, distinguished. *Toronto, Hamilton & Buffalo R.W. Co. v. Simpson Brick Co.*, 464.

FENCES.

Lands not Enclosed—Liability to Fence—Railway Act, 1906, secs. 254, 294—Railway Act,

1888, sec. 194—53 Vict. ch. 28, sec. 2, sub-sec. 3.]—See CATTLE AT LARGE.

Unauthorized Crossing not on Highway — Dedication.] — See HIGHWAY CROSSING.

FENCES AND GATES.

Animals Killed on Track — Escape to Highway From Enclosure—Open Gate From Highway to Station Ground—Fence and Gate not of Sufficient Height — Negligence — Contributory Negligence — Sec. 237, sub-sec. 4, Railway Act, 1903.]—The plaintiff's horses escaped from his field by jumping over a fence of insufficient height and going upon the highway, went a short distance, got on to the track through an open gate leading to defendants' station ground where they were killed by a train.

Held. that the company was not negligent by failing to keep their gate closed through which the horses reached the track, and the negligence of the plaintiff in having a fence of insufficient height was the cause of the accident. *Laporte v. Canadian Northern Quebec R.W. Co.*, 137.

FLAG STATION.

Jurisdiction of the Board—Agents — Annual Earnings — Grain Shipments—Secs. 30(g), 258, 284(1) (a) & (3), Railway

Act.]—Under secs. 30 (g), 258, 284(1) (a) & (3) of the Railway Act, the Board has jurisdiction to require a railway company, to erect and maintain platforms or freight sheds or any other structures or works that may be deemed reasonably necessary for the protection of property or the public at stopping places on the railway (known as flag stations) used for unloading and delivering traffic.

At such stations a suitable shelter or waiting room should be erected for both passengers and freight, provided with a door and windows, proper platforms and approaches.

At stations where the total freight and passenger earnings amount to \$15,000 per annum the company should appoint and maintain permanent agents; at points where the business consists principally of shipping grain, and such shipments amount to at least 50,000 bushels, agents should be appointed and maintained during the grain shipping season; at points of shipment where a telegraph operator is located for the handling of trains he should be provided with the necessary equipment to handle all traffic thereat. *Winnipeg Jobbers' & Shippers' Association v. Canadian Pacific, Canadian Northern & Grand Trunk Pacific Ry. Cos.*, 151.

FREIGHT RATES.

Lumber—Special Contract—Discrimination—Local and Joint Tariffs—Higher and Export Rates.]—See **TARIFFS**, 3.

GATES.

See **CATTLE AT LARGE**.
See **FENCES AND GATES**.

GOODS IN TRANSIT.

Contract Limiting Liability.]—See **CARRIERS OF GOODS**, 1.

GRAVEL.

Removal by Railway—Homesteaders—Rights of—Damages.]—See **TRESPASS**.

HIGHWAY.

Construction of Subway Under Tracks—Raising Highway—Injunction—Jurisdiction of Board.]—See **SUBWAY**.

Diversion—Compensation—Landowners' Interest—Access to Navigable Waters—Foot Crossing.]—See **EXPROPRIATION**, 6.

Escape of Animals to—Open Gate—Station Grounds—Insufficient Height of Fences.]—See **FENCES AND GATES**.

HIGHWAY CROSSING.

Injury to Person Using—Defective Construction—Crossing not on Highway—Not Authorized by Board of Railway Commissioners—Dedication—Duty

of Company to Fence—Time in Which Action Must be Brought.]—*Held* (Wetmore, C.J., *hesitante*), that when a railway company establishes a crossing, not authorized by the Board of Railway Commissioners, over its railway, at a point other than on a highway and invites the public to use such crossing, it is the duty of the company to take every precaution for the safety of the public using such crossing and in view of the statutory provisions requiring the company to fence the approaches to a railway crossing over a highway properly authorized, the failure of the company to so fence an authorized crossing constitutes such negligence as will render the company liable for injury to any person sustained on such crossing when the proximate cause of such injury is the failure of the company to fence.

Also, that the provisions of the Railway Act, 1903, as to the time in which actions may be brought apply to the Canadian Pacific Railway Company, and that the action was properly brought more than six months, but within one year after the date of the injury complained of. *Bird v. Canadian Pacific R.W. Co.*, 314.

Intersection of—Order of Railway Committee—Failure to Obey—Joint Indictment—Validity.]—See **CRIMINAL LAW**.

Statutory Signals—Evidence—Verdict contrary to—New Trial.]—See NEGLIGENCE, 1.

HOMESTEADERS.

Rights of—Gravel—Removal by Railway—Damages.]—See TRESPASS.

INDEMNITY.

Access to Lands—Location of Crossing—Convenience—Damage by Accidents at.]—See FARM CROSSING, 1.

INDICTMENT.

Order of Railway Committee—Highway Crossing—Failure to Obey—Joint Indictment.]—See CRIMINAL LAW.

INFANT.

Access to Machinery—Liability of Company—Allurement—Contributory Negligence.]—See NEGLIGENCE, 6, 7.

Electric Railway—Carelessness of Motorman—Proper Precautions—Evidence.]—See NEGLIGENCE, 8.

Next Friend—Action by—Illegal—Amendment of pleadings.]—See NEGLIGENCE, 9, 10.

INJUNCTION.

Construction of Highway Under Tracks—Raising Subway—

Jurisdiction of Board—Interim Injunction.]—See SUBWAY.

INTEREST.

Award—Appeal from.]—See EXPROPRIATION, 3.

INTERSWITCHING.

Charges Paid Under Protest—Recovery.]—See DISCRIMINATION, 6.

JOINT TARIFFS.

Public Interest—Existing Rate—Reasonableness—Through Rates—Reasonable Facilities—Continuous Route.]—See TARIFFS, 2.

JURISDICTION OF BOARD.

Full Court—Co-ordinate Jurisdiction—Order of Board—Non-compliance with—Appeal—Stay of Proceedings.]—See BOARD OF RAILWAY COMMISSIONERS, 3.

Dominion Railway—Provincial Railway—Crossing—Connection.]—See CONSTITUTIONAL LAW, 1.

Electric Railway—Power Line—Protection of the Public and Other Lines—By-law.]—See BOARD OF RAILWAY COMMISSIONERS, 2.

Location of Railway—Municipality—Consent—Crossing—Leave of Board—Discretion.]—

See BOARD OF RAILWAY COMMISSIONERS, 1.

JURY.

Misdirection — Objection at Trial—New Trial.]—See NEGLIGENCE, 4, 5.

Province of Judge — Withdrawal from Jury—Assessment of Damages—Wrongful Admission of Evidence.]—See NEGLIGENCE, 9, 10.

Rules of Company—Construction of—Collision.]—See NEGLIGENCE, 12.

JURY TRIAL.

Pleading — Jury — Amendment.]—See NEGLIGENCE, 9, 10.

LANDS.

Fences—Lands not Enclosed —Liability of Railway to Fence —Cattle at Large.]—See CATTLE AT LARGE.

Removal of Gravel by Railway—Homesteaders—Rights of —Damages.]—See TRESPASS.

LANDS TAKEN FOR RAILWAY PURPOSES.

See EXPROPRIATION, 1, 2, 3, 4, 5, 6.

LEVEL CROSSING.

See HIGHWAY CROSSING.

LIMITATION OF ACTIONS.

Highway Crossing—Injury to Person Using—Defective Construction — Unauthorized by Board — Dedication — Duty to Fence.]—See HIGHWAY CROSSING.

LIVE STOCK CONTRACT.

Limiting Liability — Negligence — Validity of Contract—Approval by Board.]—See CARRIERS OF GOODS, 2, 3.

LOCAL RATES.

Traders' Tariffs—Distributing Centre—Through Rates — Undue Preference Between Persons and Localities—"Similar Circumstances and Conditions"—Evidence.]—See DISCRIMINATION, 4.

LOCATION OF RAILWAY.

Municipality — Consent — Crossing — Leave of Board — Jurisdiction — Discretion.]—See BOARD OF RAILWAY COMMISSIONERS, 1.

LORD'S DAY ACT.

Jurisdiction of the Board — Freight Traffic—Undue Delay—The Lord's Day Act, R.S.C. ch. 153, sec. 12—Railway Act, sec. 2(32).]—The Grand Trunk Railway Company applied to the Board for an order under sub-

sec. *x* of sec. 12 of the Lord's Day Act, R.S.C. ch. 153, permitting it to do certain work on the Lord's Day in order to prevent undue delay to traffic.

Held, upon the evidence that in order to prevent undue delay to traffic the applicants may be permitted on the Lord's Day—

1. To unload grain carriers and load grain into cars at Ontario Lake Ports between September 15th in any year and June 1st in the following year.

2. Between said dates do such work as may be necessary to furnish at such ports a continuous railway service for carrying grain from elevators and vessels.

3. Perform all work necessary for delivery to their destinations of freight cars in transit when the Lord's Day began. Other railways carrying grain from said ports are entitled to the like privileges. *Re Lord's Day Act and Grand Trunk Ry. Co. 23.*

MASTER AND SERVANT.

Injury to servant and consequent death—Collision—Engine driver—Disobedience to rules—Contributory negligence—Locomotive and train in good working order—Evidence—Negligence of fellow servants.]—The deceased, an engine driver in the employ of the defendants, while driving a train, was killed in a rear end collision between his locomotive and a train in front

caused by his disobedience to rules, either in not seeing the danger signal or if he did, in not stopping his train.

Held, 1. That the engineer was the author of his own misfortune and his widow could not recover damages from the defendants for his death.

2. That the negligence of his fellow servants did not better the condition of the servant in fault. *Ruddick v. Canadian Pacific R. W. Co., 484.*

MUNICIPALITY.

By-law—Passenger Fares—School Children—Reduced Rates.]—See STREET RAILWAYS.

Location of Railway—Crossing—Leave of Board—Jurisdiction—Consent—Discretion.]—See BOARD OF RAILWAY COMMISSIONERS, 1.

Power Line—Electric Railway—Protection of the Public and Other Lines—Jurisdiction of the Board.]—See BOARD OF RAILWAY COMMISSIONERS, 2.

NAVIGABLE RIVER.

Access to—Diversion of Highway—Compensation—Foot Crossing.]—See EXPROPRIATION, 6.

NEGLIGENCE.

1. *Operation of Railway—Level Crossing—Statutory Signals—*

Findings Against Weight of Evidence — New Trial — Practice.] — S. sustained injuries through running into the engine of a railway train while he was riding a bicycle over a level highway-crossing. On the trial of his action to recover damages, his witnesses stated that they had not heard the whistle sounded nor the bell of the engine rung, and he admitted that he had not taken any precautions to ascertain whether he could cross the track in safety. The evidence for the defence was positive as to the statutory signals being properly given, as well as other warnings of danger.

Held, per Fitzpatrick, C.J. and Duff, J., that the question was not as to the credibility of the witnesses on either side, but whether the character of the evidence for the plaintiffs could, in a reasonable view of the whole evidence adduced, be held to countervail the direct and positive testimony on behalf of the defendants, and, as it could not, the findings by the jury that the company had been guilty of negligence in failing to give the statutory signals were against the weight of evidence and unreasonable.

Per Girouard, J., that S. was guilty of contributory negligence in failing to take proper precautions to avoid the accident and the action should be dismissed. *Railroad Company v.*

Houston, 95 U.S.R. 697, referred to.

The judgment appealed from was reversed and a new trial ordered, *Idington and Maclennan. JJ., dissenting. Grand Trunk R.W. Co. v. Sims*, 61.

2. *Street Railways—Accident — Contributory Negligence — Nonsuit.*] — The plaintiff, intending to take a street car going westerly, so as to reach his house, on arriving, shortly after midnight, at the southerly side of the street on which the particular car line was, saw a car coming westerly about 300 feet off, and without again looking for the car he attempted to cross over the street in a westerly diagonal direction, so as to reach a street corner, where he expected the car would stop, it being, as he said, the usual practice for all cars to stop there, though it appeared there was no rule requiring them to do so, and because he saw two persons standing at the corner apparently waiting for the car, and who had signalled it to stop, but of this he was not aware. The car, however, ran past the corner, knocking down the plaintiff and severely injuring him. The motorman had seen the plaintiff when the car was about 150 feet off. It was claimed that the motorman was intoxicated and incapable of knowing what he was doing, and that the car was going at an excessive rate of

speed. The place was well lighted and nothing to obstruct the view:—

Held, that the accident was attributable to the plaintiff's own want of care in attempting to cross over the street as he did, and that the case, therefore, should have been withdrawn from the jury.

Magee, J., dissented on the ground that it was a question for the jury.

Judgment of Britton, J., at the trial reversed. *Tinsley v. Toronto R.W. Co.*, 69.

3. *Street Railways—Injury to Person Crossing in Front of Car—Omission to Stop at Usual Stopping Place, when Signalled—Contributory Negligence—Nonsuit.*]—The plaintiff intending to take a street car going westerly, on arriving, shortly after midnight, at the southerly side of the street, on which the particular car line was, saw a car coming westerly very rapidly, being then about 300 feet off. He saw two persons standing at the corner signal the car to stop, and believing that it would do so, it being the usual and customary practice to stop at the corner, when persons wished to get on or off the car, he, without again looking to see where the car was, attempted to cross in front of it, so as to get on it, when, instead of stopping, it ran past the corner, knocked down the plaintiff and injured him:—

Held, that it could not be said that there was inexcusable negligence on the plaintiff's part in attempting to cross the street in front of the car, for he might reasonably assume that the car would stop at the corner in pursuance of the signal to do so, and that the case therefore could not have been withdrawn from the jury; and was properly submitted to them.

Judgment of the Divisional Court (1907), 15 O.L.R. 438, ante, p. 69, reversed. *Tinsley v. Toronto R.W. Co.*, 90.

4. *New Trial—Misdirection—Charge to Jury—Objection at Trial.*]—Appeal allowed from the judgment of the Divisional Court, reported 13 O.L.R. 423, 6 Can. Ry. Cas. 261, granting a new trial.

Per OSLER, J.A.:—There is no hard and fast rule which absolutely prohibits the Court from entertaining an objection on the ground of misdirection when the party has omitted to take it at the trial. *Brenner v. Toronto R.W. Co.*, 100.

5. *Street Railway—Rules of Company—Charge of Judge—Contributory Negligence.*]—A rule of the Toronto Ry. Co. provides that "when approaching crossings and crowded places where there is a possibility of accidents the speed must be reduced and the car kept carefully under control. Go very slowly over all curves, switches and in-

tersections; never faster than three miles an hour . . .” A girl on the south side of Queen Street wished to cross to University Avenue which reaches but does not cross Queen. She saw a car coming along the latter street from the east and thought she had time to cross, but was struck and severely injured. On the trial of an action for damages the Judge in his charge said: “It is not a question, gentlemen of the jury, as to the motor-man’s duty under the rule, it is a question of what is reasonable for him to do.” The jury found that defendants were not guilty of negligence; that plaintiff by the exercise of reasonable care could have avoided the injury; and that she failed to exercise such care by not taking proper precautions before crossing. The action was dismissed at the trial; a Divisional Court ordered a new trial on the ground that the Judge had misdirected the jury in withdrawing from their consideration the rules of the company; the Court of Appeal restored the judgment at the trial.

Held, affirming the judgment of the Court of Appeal, 15 O.L.R. 195, ante, p. 100, which set aside the order of the Divisional Court for a new trial, 15 O.L.R. 423, Idington, J., dissenting, that the action was properly dismissed.

Held, per Girouard and Duff,

JJ.:—The Judge’s charge was open to objection but as under the findings of the jury and the evidence plaintiff could not possibly recover a new trial should be refused.

Per Davies, J.:—There was no misdirection. The jury were not led to believe that the rules were not to be considered, but only that they should not be the standard as to what was or was not negligence, which question should be decided on the facts proved.

Per MacLennan, J.:—The place at which the accident occurred, where University Ave. meets Queen Street, is not a crossing nor intersection within the meaning of the rules and they do not apply in this case. *Brenner v. Toronto R.W. Co.*, 108.

6. *Liability for Tort—Allowing Access of Children to Machinery.*]—*Held*, a railway company that leaves a mechanical contrivance (e.g., a turntable) in an open place to which children of tender years are allowed access, is guilty of negligence and liable for the consequences of their unskilful handling of it. *Coley v. Canadian Pacific R.W. Co.*, 269.

7. *Liability for Tort—Allowing Children Access to Machinery.*]—*Held*, a railway company, that leaves a mechanical contrivance (e.g., a turntable) in an

open place to which children of tender years are allowed access. is guilty of negligence and liable for the consequence of their unskilful handling of it. *Canadian Pacific R.W. Co. v. Coley*, 274.

8. *Electric Tram Company—Injury to Infant—Failure of Motorman to Take Proper Precautions—Evidence.*]—In an action brought in the name of an infant, claiming damages for injuries occasioned through the alleged negligence of the defendant company in the operation of their electric tramway, the evidence shewed that the infant, a child aged one year and eleven months, was seen approaching the track upon which one of the defendant's cars was moving slowly. The whistle was sounded and the child stopped for a moment and then moved quickly towards the car and was struck, and received the injuries for which the action was brought. Upon seeing the child stop when the whistle was blown, the motorman immediately applied speed without waiting to see whether the child was going to retreat or making any effort to remove it from its dangerous position.

Held, that this was a clear case of reckless conduct for which defendant was responsible.

Also, that the failure to take proper precautions to avert injury to the child was not to be

excused by the alleged necessity of complying with the time table and preventing delay to passengers.

Also, that the failure of defendant company to provide its car with a fender was clear evidence of negligence. *Lott v. Sydney & Glace Bay R.W. Co.*, 276.

9. *Pleading—"Not Guilty by Statute"—Railway Law—Specific Denial of Representative Capacity of Plaintiff—English M.R. 238 — Trial by Jury — Necessity of Amendment at Trial.*]—The plea of "not guilty by statute" is not a specific denial of the representative character of the plaintiff alleged in the statement of claim.

Where, therefore, a plaintiff, as administratrix of her deceased husband, sued a railway company for damages for causing his death by negligence and the company pleaded "not guilty by statute," but did not specifically deny the representative character of the plaintiff,

Held, that, although the evidence shewed that the plaintiff was an infant at the time letters of administration were granted, this fact was no answer to a motion for judgment on the verdict of the jury in favour of the plaintiff, no amendment having been asked for at the trial, and the case having been left to the jury on the pleadings as they

stood. *Toll v. Canadian Pacific R.W. Co.*, 291.

10. *Negligence — Action by Executor or Administrator Under Lord Campbell's Act* (C.O. (1898) ch. 48)—*Railway Act—Pleading—"Not Guilty by Statute"*—*Jury — C.O. (1898) 28—Constitutional Law — The Body of Common and Statute Law Continued Under "The Alberta Act"*—*The Effect of the Repeal of the North-West Territories Act* (R.S.C. (1886) ch. 50), by Schedule "A.," R.S.C. (1906) as Amended by 6 & 7 Edw. VII. (Dom.) ch. 44—*Executors and Administrators — Grant of Probate, or Letter of Administration to an Infant—Right to Sue—Practice—Next Friend—Irregularity — Waiver — Rule 538—Evidence—Wrongful Reception of Evidence — Acts of Party charged with Negligence to Prevent Occurrence of Accidents in Future — Insufficiency of Evidence—Withdrawing Case from Jury—Assessment of Damages Under C.O. (1898) ch. 48, sec. 3—Province of Judge and Jury—Excessive Damages.*]—"The Ordinance respecting juries" was not brought into force in this Province by reason of the repeal of the North-West Territories Act by R.S.C. (1906) ch. and schedule "A." (R.S.C. vol. 3, p. 2941).

The effect of 6 & 7 Edw. VII. (Dom.) ch. 44, considered. Independently of "The North-

West Territories Act, 1905" (4 & 5 Edw. VII. (Dom.) ch. 27) the effect of the Alberta Act was not to repeal the former North-West Territories Act, but to prevent its remaining in force *proprio vigore*; and to continue (sec. 16) in force, the law therein contained as a body of law, in the same manner as the common and statute law of England, as it stood on July 15th, 1870, was introduced into the Territories.

If an infant sues, without naming a next friend, it is a mere irregularity, and may be waived by an unconditional appearance of the defendant. But quite independently of waiver there must in every case be some stage at which it is too late to take advantage of a mere irregularity. In any case the Judge can deal with it under rule 538.

Letters of administration granted to an infant are not void, but voidable; and *semble*, until revoked the infant can sue, *qua* administrator, and need not be represented, when so suing, by a next friend.

In an action for negligence, it is not improper to receive evidence as to what may have been done by the defendants subsequently to remedy the defects or dangers complained of, but the jury should be warned that such evidence taken by itself is no evidence of negligence. If there be no other evidence of negli-

gence the case should be withdrawn from the jury.

The evidence in this case considered, as to whether the case should have been left to the jury or not.

It is within the discretion of the trial Judge to submit special questions to the jury or not; but in either case the jury may render a general verdict.

The words "the Court may give such damages," in C.O. (1898) ch. 48, sec. 3, means the Judge at trial, or the Judge and the jury, as the case may be.

Seemle, a verdict for \$4,500, under the circumstances of this case, cannot seriously be excepted to. *Toll v. Canadian Pacific R.W. Co.*, 294.

11. *Street Railway — Driver of Vehicle—Crossing in Front of Approaching Car—Contributory Negligence.*]—The plaintiff was driving easterly in his carriage and pair of horses, at a moderate pace, along one of the streets of a city, and on arriving within thirty feet of a cross street, on which there was a street car line, he saw a car coming from the north, where there was a down grade, approaching at a rapid rate, the car being then about 300 feet distant. The plaintiff admitted that he could easily have stopped his carriage and horses before reaching the track. He consulted with his coachman, and, both being of the opinion the speed of the car was not

so great as to prevent their crossing in safety, he attempted to do so, when the carriage was struck by the car, and damaged, and he, himself, injured. No attempt was made by the motorman to slow down the car. On questions submitted to the jury, they found that the accident was caused through the defendants' negligence, such negligence consisting in the car not being under proper control, and that there was no contributory negligence on the plaintiff's part:—

Held, that it could not be said, in all the circumstances, the plaintiff acted so recklessly as to preclude the submission to the jury of the question whether or not he acted with reasonable care; and a finding by the jury in the plaintiff's favour was upheld.

Judgment at the trial and of the Divisional Court affirmed, *Moss, C.J.O.*, and *Meredith, J.A.*, dissenting. *Milligan v. Toronto R.W. Co.*, 434.

12. *Collision—Rules of Railway Company—Construction of Rules—Functions of Jury.*]—In an action for damages for the death of an engine driver of the Grand Trunk Railway Co., whose train came into collision with a train of the defendant railway, it was contended by defendants that the accident happened through the negligence of the deceased in disobeying certain rules of his employers. Ques-

tions were put to the jury as to the negligence of the defendants and contributory negligence of the deceased:—

Held, that there must be a new trial, because the jury should also have been asked whether the deceased had obeyed the rules of his employers applicable to the circumstances under which he was placed at the time of the accident, and whether but for that disobedience the accident would have happened.

It is for the trial Judge to interpret such written rules of railway companies, subject to this, that it is for the jury to determine the meaning of technical terms used in them on the explanatory evidence offered. *Walker v. Wabash R.W. Co.*, 487.

Animals Killed on Track — Escape to Highway — Station Grounds — Gates Open from Highway—Insufficient Height of Fences.] — See FENCES AND GATES.

Collision — Engine Driver — Disobedience to Rules — Evidence — Contributory Negligence.]—See MASTER AND SERVANT.

Contract Limiting Liability—Approval of Board—Validity.]—See CARRIERS OF GOODS, 2, 3.

Unauthorized Crossing — Defective Construction — Dedication—Duty to Fence—Limitation of Actions.]—See HIGHWAY CROSSING.

NEW TRIAL.

By-law Fixing Tolls—Reasonableness—Non-approval by Governor-in-Council—Amendment.]—See TOLLS, 1.

Evidence—Verdict Contrary to—Practice.]—See NEGLIGENCE, 1.

Misdirection—Judge's Charge—Objection at Trial.] — See NEGLIGENCE, 4, 5.

NONSUIT.

Street Railway—Crossing in Front of Car—Usual Stopping Place—Omission to Stop.]—See NEGLIGENCE, 2, 3.

"NOT GUILTY BY STATUTE."

Pleading — Representative Character of Plaintiff — Jury Trial—Amendment at Trial.]—See NEGLIGENCE, 10.

NOTICE OF LOSS.

Live Stock Contract—Omission to Give—Approval of Conditions by Board.]—See CARRIERS OF GOODS, 2.

OFFER.

Lands Taken for Railway Purposes — Acceptance of Amount Offered.]—See EXPROPRIATION, 2.

ORDER OF BOARD.

Co-ordinate Jurisdiction of the Court — Enforcement of — Appeal—Stay of Proceedings.] — See BOARD OF RAILWAY COMMISSIONERS, 3.

Disobedience of—Indictment of Two Railways—Validity of.] —See CRIMINAL LAW.

PASSENGERS.

Right to Particular Seat—Removal from—Authority of Conductor — Seat Temporarily Vacated by Another—Smoking Car —Assault — Damages — Costs.] —See CARRIERS OF PASSENGERS.

PAYMENT INTO COURT.

Arbitration — Compensation —Costs.] — See EXPROPRIATION, 5.

PLEADING.

Not Guilty by Statute—Representative Character of Plaintiff —Jury Trial — Amendment at Trial.]—See NEGLIGENCE, 9, 10.

POWER LINE.

Electric Railway—Protection of the Public and Other Lines —Jurisdiction of the Board.]— See BOARD OF RAILWAY COMMISSIONERS, 2.

PRACTICE.

Interim Injunction — Appeal —Raising Highway — Jurisdiction of Board.]—See SUBWAY.

New Trial—Evidence — Verdict Contrary to.]—See NEGLIGENCE, 1.

Pleading—Not Guilty by Statute—Representative Character of Plaintiff — Jury Trial — Amendment.]—See NEGLIGENCE, 9, 10.

RAILWAY ACTS.

See STATUTES.

RAILWAY COMMITTEE.

Order of—Protection of Street Crossing — Joint Indictment — Failure to Obey Order.]—See CRIMINAL LAW.

RAILWAY CROSSING.

Dominion Railway — Provincial Railway — Jurisdiction of Board.] — See CONSTITUTIONAL LAW, 1.

Jurisdiction of Board — Discretion—Location of Railway— Municipality — Consent.] —See BOARD OF RAILWAY COMMISSIONERS, 1.

RULES.

Construction of — Functions of Jury — Collision.] — See NEGLIGENCE, 12.

Disobedience to—Collision — Negligence — Contributory Negligence — Negligence of Fellow Servants.] — See MASTER AND SERVANT.

Judge's Charge — Misdirection — New Trial — Contributory Negligence.] — See NEGLIGENCE, 4, 5.

RUNNING RIGHTS.

Jurisdiction of the Board—Agreement Validated by Special Act—Compensation — Arbitration—52 Vict. ch. 77—Railway Act, secs. 3, 30(h), 176, 364.]—The Bay of Quinte Ry. Co. applied to the Board under section 364 of the Railway Act, or any other pertinent section for an order directing the Kingston & Pembroke Ry. Co. to ascertain and settle the compensation payable by the applicant to the respondent in respect to the running rights possessed by the applicant over a portion of the Kingston & Pembroke Railway.

By an agreement between the parties, validated by statute 52 Vict. ch. 77 (D.) such compensation in case of dispute was to be settled by arbitration.

Held, that the Board had no jurisdiction to entertain the application. *Bay of Quinte Ry. Co. v. Kingston & Pembroke Ry. Co.*, 202.

SIGNALS.

Level Crossing — Weight of Evidence—Verdict—New Trial.] —See NEGLIGENCE, 1.

SMOKING CAR.

Duty of Railway—Right to Seat—Authority of Conductor—Assault.]—See CARRIERS OF PASSENGERS.

STATION.

Flag Station—Jurisdiction of Board—Agents—Annual Earnings—Grain Shipments.] — See FLAG STATION.

STATION GROUNDS.

Gate to Highway—Escape of Animals to Track—Negligence—Contributory Negligence.] —See FENCES AND GATES.

STATUTES.

Construction of — Dominion Railway Act, 1888, sec. 191—Use of Farm Crossing—Agreement to Provide and Maintain—Easement—Severance of Ownership.]—See FARM CROSSING, 3.

STATUTES REFERRED TO.

- 1 Edw. VII. ch. 92 (Ont.), p. 14.
- 4 Edw. VII. ch. 47, p. 195.
- 6 Edw. VII. ch. 184 (D.), p. 14.

Criminal Code,

- sec. 165, p. 453.
- sec. 221, p. 453
- sec. 247, p. 453

R.S.C. ch. 153, sec. 12, p. 23

44 Vict. ch. 1, sec. 19 (D.), p. 265

44 Vict. ch. 1, sec. 22 (D.), p. 346

53 Vict. ch. 28, sec. 2, p. 143

Railway Act, 1879, sec. 17, p. 346

Railway Act, 1888

- sec. 191, p. 464
- sec. 194, p. 143

Railway Act, 1903

- sec. 3, p. 195
- sec. 8, p. 195
- sec. 237 (4), p. 137
- sec. 266, p. 46
- sec. 267, p. 46
- sec. 276, p. 46

Railway Act, 1906

- sec. 2, p. 244
- sec. 2 (32), p. 23
- sec. 3 (30), p. 202
- sec. 7, p. 46
- sec. 30, p. 151
- sec. 33, p. 453
- sec. 77, p. 42, 168
- sec. 155, p. 53
- sec. 159, p. 223
- sec. 176, p. 202
- sec. 178, p. 354
- secs. 192, 214, p. 226
- sec. 199, p. 244
- sec. 235, p. 14
- sec. 237, p. 14, 20
- sec. 238, p. 14, 20
- sec. 252, p. 50, 190
- sec. 253, p. 50, 190
- sec. 254, p. 143
- sec. 258, p. 151
- sec. 284 (7) p. 151, 372, 389
- sec. 294, p. 143
- sec. 315, p. 33, 183, 346
- sec. 317, p. 33, 46
- sec. 323, p. 10
- sec. 333, p. 46

- sec. 334, p. 46
- sec. 338, p. 46
- sec. 340, p. 372, 389
- sec. 341, p. 42, 168
- sec. 364, p. 202
- sec. 427, p. 453
- sec. 431, p. 453

STAY OF PROCEEDINGS.

Order of Board—Co-ordinate Jurisdiction of Court—Enforcement of—Appeal.] — See BOARD OF RAILWAY COMMISSIONERS, 3.

STONE.

Rates on—Mileage Basis—Existing Industries.]—See TARIFFS, 1.

STREET RAILWAYS.

By-law of Municipality—Passenger Fares—School Children—Reduced Rates.]— Under a municipal by-law governing a street railway, it was provided that the ordinary cash fare should be 5 cents, children under five years of age, not occupying a seat and accompanied by its parent, to be carried free; and for every child under twelve years of age, except as aforesaid, the fare should not exceed 3 cents. Tickets were to be issued and sold at the following rates: Ordinary tickets, six for 25 cents, each ticket to be taken for an ordinary 5 cent cash fare; children's and school children's tick-

ets. ten for 25 cents, each ticket to be taken for a 3 cent fare, as above provided; workmen's special tickets, eight for 25 cents, to be taken for a 5 cent fare:—

Held, reversing the order of the Ontario Railway and Municipal Board, that the children entitled to school children's tickets were those under the age of twelve years, and not those under twenty-one, even though the latter were actually attending school. *In re Township of Sandwich East and Windsor & Tecumseh Electric R.W. Co.*, 125.

Contributory Negligence — Nonsuit — Injury to Person Crossing in Front of Car — Usual Stopping Place — Omission to Stop.]—See NEGLIGENCE, 2, 3.

Driver of Vehicle — Crossing — Approaching Car — Contributory Negligence.]—See NEGLIGENCE, 11.

New Trial — Misdirection — Judge's Charge — Contributory Negligence.]—See NEGLIGENCE, 4, 5.

SUBWAY.

Injunction — Construction of Subway Under Railway Tracks Along Highway — Privilege to Raise Grade of Highway "or any Part Thereof" — Railway Commission, Jurisdiction of — Interim Injunction Affirmed on Appeal, Effect of.]—For many years the defendants, by agree-

ment with the city of Winnipeg, had occupied a portion of the width of Point Douglas Avenue in said city with the tracks of its main line. In 1904 a further agreement was made between the city and the company, and ratified by the Legislature, whereby the company obtained the right to raise the grade of Point Douglas Avenue or of any part thereof to a height not exceeding ten feet above the then existing grade upon certain conditions.

Held, that the words "or any part thereof" related to a part of the breadth as well as of the length of the avenue, and that the defendants had a right to raise the grade of the southerly forty-five feet in width of the avenue leaving twenty-one feet at its original height, although the result of that was to diminish the value of the plaintiff's lots on account of the construction of a subway alongside of them.

Held, also, that an order of the Board of Railway Commissioners granting leave to the defendants to construct such subway was valid and binding, although it had been made *ex parte* and in ignorance of the fact that the plaintiff had previously obtained an interim injunction against such construction, the plaintiff having made no application to rescind or vary the order as he might have done.

C.P.R. v. G.T.R. (1906), 12 O.L.R. 320, 5 Can. Ry. Cas. 400, followed.

The interim injunction granted in 1905 had been affirmed on appeal before the hearing of the cause.

Held, that that decision was not binding on the trial Judge and did not divest him of the responsibility of deciding the case upon the merits at the hearing. *Fraser v. Canadian Pacific R.W. Co.*, 205.

Undercrossing—Farm Operations—Contract.] — See FARM CROSSING, 2.

SUNDAY OBSERVANCE.

See LORD'S DAY ACT.

TARIFFS.

1. *Rates on Stone—Mileage Basis—Existing Industries—Railway Act, sec. 323.*]—In the making of rates for the carriage of freight the question of the distance of haul while important to be considered is in many cases a minor consideration.

Where large quarries have been established and capital invested for many years upon the faith of low rates for the carriage of stone being given; upon application by the railway companies for an increase of five cents a ton within certain areas, an application was made by the

operators to establish new rates upon a mileage basis for points within a radius of fifty miles from the principal market.

Held, that as the adoption of such a rate would destroy many existing industries, and in no way reduce the price of stone to the consumer, but enure very largely to the benefit of the applicants, or some of them, the application should be refused, and a new scale of rates as recommended by the Chief Traffic Officer based upon the existing system was approved. *Doolittle & Wilcox v. Grand Trunk & Canadian Pacific Ry. Cos.*, 10.

2. *Joint Tariffs—Public Interest—Existing Rate—Reasonableness or Otherwise—Through Rates—“Reasonable Facilities”—Continuous Route—Railway & Canal Traffic Act, 1888, sec. 25—Railway Act, secs. 7, 317, 333, 334, 338—Railway Act, 1903, secs. 266, 267, 276.*]—The Algoma Central & Hudson Bay Ry. Co. applied to the Board for an order directing the Grand Trunk Ry. Co. to make a joint tariff with them.

The steamers of the applicant railway wished to obtain a joint tariff with the Grand Trunk so as to compete for traffic from points in Ontario reached by the lines of the Grand Trunk and carry such traffic from lake ports by their steamers to ports in Northern Ontario and vice versa

reached by their steamboats and railway. The Grand Trunk Ry. Co. has now a similar joint tariff arrangement with the Northern Navigation Company.

Held, 1. That the applicant has not proved that there is a public interest involved, or

2. That the existing rate arrangement is unreasonable. *Algonoma Central & Hudson Bay Ry. Co. v. Grand Trunk Ry. Co.*, 46.

3. *Freight Rates—Short and Long Poles—Lumber—Special Contract—Unjust Discrimination—Special, Local and Joint Tariffs—Carriage in More Than One Car—Higher and Export Rates.*—On a complaint to the Board of unjust discrimination between the rates on telegraph, telephone and trolley poles and those on lumber and other forest products.

Held, 1. That the rates charged on poles loaded on one car shall not be greater than those on common lumber as provided in the special, local and joint tariffs of the railway companies.

2. That on poles so long as to require more than one car for their carriage the railways be authorized to charge 20 per cent. higher than for one car.

3. That poles may be exported by Canadian railway companies with the concurrence of their United States connections under

joint rail rates for general traffic at the lumber classification.

Scobell v. Kingston & Pembroke R.W. Co., 3 Can. Ry. Cas. 412, referred to. *Rideau Lumber Co. et al. v. Grand Trunk and Canadian Pacific Ry. Cos.*, 339.

Discrimination—Freight and Passenger Traffic—Reduced and Higher Tolls—Contract Between Province and Dominion—Terms of Union.]—See CONSTITUTIONAL LAW, 2.

Distributing Centre—Traders' Tariffs—Through Rates—Local Rates—Undue Preference Between Persons and Localities—Higher Tolls and Shorter Distances—“Similar Circumstances and Conditions”—Restoration of Former Tariffs—Evidence.]—See DISCRIMINATION, 4.

Group Rates—Common Points—Main and Branch Line Traffic—Similar Circumstances.]—See DISCRIMINATION, 5.

Westbound Rates—Discrimination Between Localities—Higher Rates—Restoration of Former Tariffs—Evidence.]—See DISCRIMINATION, 3.

TAXATION OF COSTS.

See COSTS.

TELEPHONE.

1. *Jurisdiction of the Board—Telephone Wires Crossing Elec-*

tric Railway—Protective Works — Junior and Senior Company — Railway Act, secs. 237, 238.]—The Board has no jurisdiction under sections 237 and 238 of the Railway Act to order the junior company at a crossing, where the wires of a telephone company are carried over an electric railway, to bear the cost of certain changes in the construction of the lines of the senior company and of certain protective appliances rendered necessary by reason of the construction and operation of the railway of the junior company, where such alterations were made by the senior company without having previously obtained an order from the Board for the making of the same. *Bell Telephone Co. v. Windsor, Essex & Lake Shore Rapid Ry. Co.*, 20.

2. *Jurisdiction of the Board—Telephone Service — Subscriber — Contract — Directory of subscribers—Right to.*]—D., a subscriber in the city of Toronto, in the Province of Ontario, to the telephone service of the respondent, applied to the Board for an order directing the respondent to furnish him with a copy of their official telephone directory containing the list of their subscribers in the towns in Western Ontario. There was no provision in the contract between D. and the respondent entitling him to be supplied with such directories in or outside of the city

of Toronto, although it is the practice of the respondent to furnish their subscribers with directories in their own districts.

Held, 1. That the Board has no jurisdiction under the statute (Railway Act and amendments) to grant the application.

2. Upon the evidence it is unreasonable that subscribers in certain districts should be furnished with directories printed for and furnished to subscribers in other districts. *Dignam v. Bell Telephone Co.*, 200.

THROUGH RATES.

Joint Tariffs—Public Interest — Reasonable Facilities — Continuous Route.]—See **TARIFFS**, 2.

Traders' Tariffs—Distributing Centre — Local Rates — Undue Preference — Evidence.] — See **DISCRIMINATION**, 4.

TOLLS.

1. *Tolls for Carriage of Goods —By-law Fixing Rates—Non-approval by Governor-in-Council—Reasonableness of Rate—Amendment to Raise Question—New Trial.*]—An action by plaintiff as liquidator of the Canada Coal and Railway Company, Limited, to recover an amount claimed from the defendant company for car rental, etc., defendant pleaded by way of offset, a claim for repayment of over-charges for

the carriage of coal made by the company in liquidation.

The evidence shewed that the Joggins Railway Company predecessors in title of the Canada Company, passed a by-law which was approved by the Governor-in-Council fixing the rate per ton for the carriage of coal over their line, and that the Canada Company subsequently passed a by-law increasing the rate, and that the defendant company were charged tolls as fixed by the latter by-law, although it had never received a sanction of the Governor-in-Council and they claimed to be entitled to recover the difference between the two amounts.

Held, that the by-law passed by the Joggins Company relating to the tolls to be taken by that company, was not a regulation affecting the road and running with the property, and was not binding upon their successors in title.

Held, also, that the Canada Company was not liable to refund moneys paid to them for the carriage of goods simply because they had failed to secure the approval of the Governor-in-Council to the by-law fixing the rates.

Held, nevertheless, that the trial Judge should have allowed an amendment applied for on the trial, intended to raise the question of the reasonableness of the

rates taken, and that the appeal must be allowed and a new trial ordered on this ground. *Rodger v. Minudie Coal Co.*, 424.

Freight and Passenger Traffic — Discrimination — Contract Between Province and Dominion — Terms of Union.]—See CONSTITUTIONAL LAW, 2.

Interswitching—Charges Paid Under Protest—Recovery of.]—See DISCRIMINATION, 6.

Reduced Rates — Adequate Consideration — Similar Circumstances and conditions — Jurisdiction of the Board—Agreement—Undue Preference.]—See DISCRIMINATION, 1, 2, 3, 4, 5, 6.

Traders' Tariffs — Through Rates — Local Rates — Higher Tolls for Shorter than Longer Distances—New Tariffs — Evidence.]—See DISCRIMINATION, 4.

TORT.

See NEGLIGENCE, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12.

TRADERS' TARIFFS.

Distributing Centre—Through Rates — Local Rates — Substantially Similar Circumstances—Evidence.] — See DISCRIMINATION, 4.

TRAFFIC.

Undue Delay—Jurisdiction of Board.]—See LORD'S DAY ACT.

TRESPASS.

Construction of Line of Railway — Removal of Gravel — Rights of Homesteaders on Dominion Lands—Damages.]—The defendant constructed a line of railway across government land and opened a gravel pit thereon, from which large quantities of gravel were removed. The plaintiff made entry for the land as a homestead. In an action for trespass,

Held, that a homesteader on Dominion lands has the exclusive right to the possession thereof, and may maintain an action for trespass.

The company endeavoured to justify its action under section 19, schedule A. of 44 Vict. ch. 1, which authorizes the company to take from adjacent public lands gravel for the construction of the railway. The evidence shewed

that the gravel was used for maintainance of the right of way.

Held, that statute referred to did not authorize the taking except for the purpose of construction which did not include maintenance of the right of way. *Smyth v. Canadian Pacific R.W. Co.*, 265.

UNDERCROSSING.

See SUBWAY.

WEST BOUND RATES.

Discrimination Between Localities — New Tariffs — Higher Rates — Restoration of Former Tariffs — Evidence.] — *See* DISCRIMINATION, 3.

WITNESSES.

Fees of Experts—Taxation of.]—*See* EXPROPRIATION, 4.

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